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BIENNIAL REPORT
OF THE
ATTORNEY GENERAL

OF THE
STATE OF NORTH CAROLINA

1924-1926

DENNIS G. BRUMMITT
ATTORNEY GENERAL

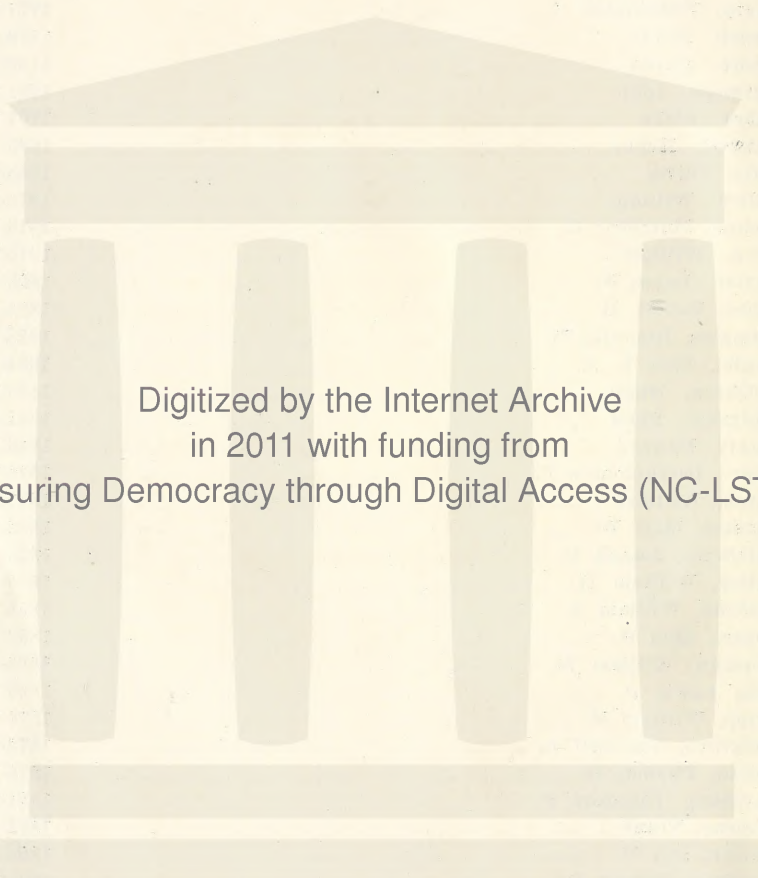
FRANK NASH
CHARLES ROSS
JOHN H. HARWOOD*
OLIVER H. ALLEN

*Succeeded by Oliver H. Allen July 8, 1926

RALEIGH
EDWARDS & BROUGHTON COMPANY
1926

LIST OF ATTORNEYS GENERAL SINCE THE ADOPTION OF THE CONSTITUTION IN 1776

	<i>Term of Office</i>
Avery, Waightstill	1777-1779
Iredell, James	1779-1782
Moore, Alfred	1782-1790
Haywood, John	1791-1794
Baker, Blake	1794-1803
Seawell, Henry	1803-1808
Fitts, Oliver	1808-1810
Miller, William	1810-1810
Burton, Hutchins G.	1810-1816
Drew, William	1816-1825
Taylor, James F.	1825-1828
Jones, Robert H.	1828-1828
Saunders, Romulus M.	1828-1834
Daniel, John R. J.	1834-1840
McQueen, Hugh	1840-1842
Whitaker, Spier	1842-1846
Stanly, Edward	1846-1848
Moore, Bartholomew F.	1848-1851
Eaton, William	1851-1852
Ransom, Matt W.	1852-1855
Batchelor, Joseph B.	1855-1856
Bailey, William H.	1856-1856
Jenkins, William A.	1856-1862
Rogers, Sion H.	1862-1868
Coleman, William M.	1868-1869
Olds, Lewis P.	1869-1870
Shipp, William M.	1870-1872
Hargrove, Tazewell L.	1872-1876
Kenan, Thomas S.	1876-1884
Davidson, Theodore F.	1884-1892
Osborne, Frank I.	1892-1896
Walser, Zeb V.	1896-1900
Douglass, Robert D.	1900-1901
Gilmer, Robert D.	1901-1908
Eickett, T. W.	1909-1916
Manning, James S.	1917-1925
Brummitt, Dennis G.	1925-



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LETTER OF TRANSMITTAL

STATE OF NORTH CAROLINA,
DEPARTMENT OF ATTORNEY GENERAL,
RALEIGH, December 1, 1926.

*To His Excellency, ANGUS W. McLEAN, Governor,
Raleigh, N. C.*

DEAR SIR:—In compliance with sections 6098-6099, Con. Stat., 1919, I herewith submit the biennial report of this department for the years 1924-1925 and 1925-1926.

Respectfully submitted,

DENNIS G. BRUMMITT,
Attorney General.

EXHIBIT I

CIVIL ACTIONS DISPOSED OF OR PENDING IN THE COURTS OF NORTH CAROLINA AND THE FEDERAL COURTS

DISPOSED OF IN THE SUPREME COURT OF NORTH CAROLINA

Attorney General v. Railways, 188 N. C., 648.
Lacy, Treasurer, v. Globe Indemnity Co., 189 N. C., 24.
State and City B. & T. Co., Exrs., v. Doughton, 188 N. C., 762.
Patterson v. Everett, Secretary of State, 189 N. C., 828.
Boon-Iseley Co. v. Doughton, 189 N. C., 720.
In re Inheritance Tax v. Estates of Burwell and Davis, 190 N. C., 358.
Calkins Dredging Co. v. State, 191 N. C., 243.
Doughton v. J. E. Johnston, Exr. (Appeal withdrawn October 5, 1926.)
Young v. Highway Commission, 190 N. C., 52.
Town of Newton v. Highway Commission. (Petition to rehear denied.)
Automotive Trade Association v. Doughton, 192 N. C., 384.

PENDING IN THE SUPREME COURT OF NORTH CAROLINA

Carlyle v. Highway Commission.
Rich's Executors v. Doughton.
Lacy, Treasurer, v. Surety Companies.
Lacy, Treasurer, v. Mass. Bonding & Insurance Co.
State Prison v. Surety Companies.
E. L. Barton v. Grist, Commissioner of Labor.
Tate v. Board of Education.
Ragan v. Doughton.
Johnston et al. v. Highway Commission.

DISPOSED OF IN THE SUPERIOR COURTS OF NORTH CAROLINA

Re Will of Eliza M. Hass. (Docketed and dismissed in Supreme Court.)
Re Will of Mary E. Hass. (Docketed and dismissed in Supreme Court.)
Walker Electrical Co. v. Sanatorium.
State v. D. C. Heath & Co.
State v. Silver, Burdett & Co.
State v. American Book Co.

PENDING IN THE SUPERIOR COURTS OF NORTH CAROLINA

State on relation of Attorney General v. Ice Companies.
 Emmett McKoy v. State College.
 Pickett and Johnson v. State Board of Education.
 Railways v. City of Goldsboro.
 Chapman-Hunt Co. v. Sanatorium.
 Haines, Jones & Cadbury Co. v. School for Blind and Deaf.
 Haines, Jones & Cadbury Co. v. State College.
 General Motors Corporation v. Doughton and Lacy.
 State v. Western Union Telegraph Co.
 State v. Postal Telegraph Co.
 Board of Charities and Pub. Welfare v. Highland Hospital et al.
 General Motors Acceptance Corporation v. Doughton.

DISPOSED OF IN UNITED STATES SUPREME COURT

Rhode Island Hospital Tr. Co. v. Doughton (reversed), 70 L. ed., 355.
 Henderson Water Co. v. Corp. Commission (judgment against plaintiff), 269 U. S., 278.

PENDING IN UNITED STATES SUPREME COURT

Wachovia Bank & Trust Co. v. Doughton.

DISPOSED OF IN CIRCUIT COURT OF APPEALS

Maryland Casualty Co. v. Fouts, Receiver, 11 Fed. Rep. (N.S.) 71.

PENDING IN CIRCUIT COURT OF APPEALS

State v. Southern Railway and Receiver of A. & Y. Railway Co.

PENDING IN U. S. DISTRICT COURT FOR EASTERN DISTRICT OF
NORTH CAROLINA

Executors of Angier B. Duke v. Doughton.

EXHIBIT II

LIST OF CASES ARGUED BY THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL BEFORE THE SUPREME COURT, FALL TERM, 1924, SPRING TERM, 1925; FALL TERM, 1925; SPRING TERM, 1926.

AUGUST TERM, 1924

1. State v. Beavers, from Durham; liquor, verdict, guilty; appeal by defendant; affirmed.
2. State v. Bradsher, from Person; liquor; verdict, guilty; appeal by defendant; affirmed.
3. State v. Bryant, from Cherokee; murder, second degree; verdict, guilty; appeal by defendant; new trial.
4. State v. Burke, from Alamance; liquor; verdict, guilty; appeal by defendant; affirmed.
5. State v. Collins, from Anson; murder, first degree; verdict, guilty; appeal by defendant; affirmed.
6. State v. Crisp, from Graham; felonious breaking; verdict, guilty; appeal by defendant; new trial.
7. State v. Dickerson, from Wilson; liquor; verdict, guilty; appeal by defendant; affirmed.
8. State v. Doss, from Lee; seduction; verdict, guilty; appeal by defendant; new trial.
9. State v. Durham, from Orange; liquor; verdict, guilty; appeal by defendant; affirmed.
10. State v. Edwards, from Rockingham; liquor; verdict, guilty; appeal by defendant; affirmed.
11. State v. Farmer, from Wayne; murder, second degree; motion to reinstate appeal denied.
12. State v. Galloway, from New Hanover; gaming; verdict, guilty; appeal by defendant; affirmed.
13. State v. George, from Surry; false entry; verdict, guilty; appeal by defendant; affirmed.
14. State v. Godette, from Craven; liquor; verdict, guilty; appeal by defendant; affirmed.
15. State v. Hammond, from Moore; liquor; verdict, guilty; appeal by defendant; affirmed.
16. State v. Hartsfield, from Wake; liquor; verdict, guilty; appeal by defendant; affirmed.

17. State v. Hilton, from Catawba; barn burning; verdict, guilty; appeal by defendant; affirmed.

18. State v. Holder, from Richmond; larceny; verdict, guilty; appeal by defendant; affirmed.

19. State v. Horner, from Alamance; assault with deadly weapon; verdict, guilty; appeal by defendant; new trial.

20. State v. Johnson, from Anson; school law; verdict, guilty; appeal by defendant; new trial.

21. State v. Johnson, from Forsyth; larceny; verdict, guilty; appeal by defendant; affirmed.

22. State v. Jones, from Pasquotank; manslaughter; verdict, guilty; appeal by defendant; affirmed.

23. State v. Judd, from Chatham; liquor; verdict, guilty; appeal by defendant; affirmed.

24. State v. Knight, from Anson; liquor; verdict, guilty; appeal by defendant; affirmed.

25. State v. Lutterloh, from New Hanover; manslaughter; verdict, guilty; appeal by defendant; affirmed.

26. State v. McLamb, from Johnston; serious assault; verdict, guilty; appeal by defendant; affirmed.

27. State v. May, from Alamance; gambling; verdict, guilty; appeal by defendant; affirmed.

28. State v. Mitchem, from Gaston; manslaughter; verdict, guilty; appeal by defendant; affirmed.

29. State v. O'Briant, from Person; offense against tax law; special verdict; appeal by State; reversed.

30. State v. Porter, from Harnett; carnal knowledge of female child; verdict, guilty; appeal by defendant; affirmed.

31. State v. Pressley, from Edgecombe; liquor; verdict, guilty; appeal by defendant; affirmed.

32. State v. Rabil, from Wake; abandonment; motion to reinstate; denied.

33. State v. Roberts, from Forsyth; fornication and adultery; verdict, guilty; appeal by defendant; affirmed.

34. State v. Roberts, from Cherokee; false pretense; verdict, guilty; appeal by defendant; affirmed.

35. State v. Robinson, from Haywood; murder, second degree; verdict, guilty; appeal by defendant; new trial.

36. State v. Rodman, from Mecklenburg; murder, first degree; verdict, guilty; appeal by defendant; affirmed.

37. State v. Rose, from Durham; liquor; verdict, guilty; appeal by defendant; affirmed.

38. State v. Stallings, from Vance; municipal ordinance; special verdict; appeal by defendant; judgment reversed.

39. State v. Walton, from Hoke; murder, first degree; verdict, guilty; appeal by defendant; affirmed.
40. State v. Weddington, from Rowan; Sunday law; verdict, guilty; appeal by defendant; affirmed.
41. State v. Wilson, from Durham; mayhem; verdict, guilty; appeal by defendant; new trial.

DOCKETED AND DISMISSED

42. State v. Bryan, from Stokes.
43. State v. Lena Watkins, from Stokes.
44. State v. Will Brown, from Forsyth.
45. State v. T. C. Arnold, from Forsyth.
46. State v. A. F. Short et al., from Buncombe.
47. State v. Farmer, from Wayne.
48. State v. Rabil, from Wayne.
49. State v. Jim Johnson, from Harnett.
50. State v. Jake Phillips, from Greene.
51. State v. Gordon, from Forsyth.
52. State v. Tom Crotts, from Davidson.
53. State v. W. T. Grubbs, from Forsyth.
54. State v. Bob Holt, from Forsyth.
55. State v. Alice Jackson, from Haywood.
56. State v. Alice Jackson, from Haywood.
57. State v. Sewell Medford, from Haywood.

FEBRUARY TERM, 1925

58. State v. Barbee, from Durham; prostitution; verdict, guilty; appeal by defendant; affirmed.
59. State v. Bost, from Cabarrus; manslaughter; verdict, guilty; appeal by defendant; new trial.
60. State v. Bradsher, from Person; judgment on bond; affirmed.
61. State v. Crook, from Union; seduction; verdict, guilty; appeal by defendant; reversed.
62. State v. Denson, from Edgecombe; municipal ordinance; verdict, guilty; appeal by defendant; affirmed.
63. State v. Dickerson, from Franklin; liquor; verdict, guilty; appeal by defendant; affirmed.
64. State v. Dove, from Craven; liquor; verdict, guilty; appeal by defendant; affirmed.
65. State v. Evans, from Nash; murder, first degree; verdict, guilty; appeal by defendant; affirmed.
66. State v. Hardy, from Beaufort; liquor; verdict, guilty; appeal by defendant; new trial.

67. State v. Hughes, from Lenoir; storebreaking; verdict, guilty; appeal by defendant; affirmed.

68. State v. Jarrett, from Forsyth; liquor; verdict, guilty; appeal by defendant; affirmed.

69. State v. Love, from Henderson; murder; first degree; verdict, guilty; appeal by defendant; affirmed.

70. State v. McAfee, from Lenoir; liquor; verdict, guilty; appeal by defendant; affirmed.

71. State v. Malpass, from Pender; obstruction of highway; verdict, guilty; appeal by defendant; affirmed.

72. State v. Miller, from Watauga; secret assault; verdict, guilty; appeal by defendant; affirmed.

73. State v. Palmore, from Guilford; Blue Sky law; verdict, guilty; appeal by defendant; new trial.

74. State v. Ray, from Buncombe; larceny; verdict, guilty; appeal by defendant; affirmed.

75. State v. Redditt, from Beaufort; assault with deadly weapon; verdict, guilty; appeal by defendant; new trial.

76. State v. Rideout, from Nash; manslaughter; verdict, guilty; appeal by defendant; affirmed.

77. State v. Sinodis, from Wake; prostitution; verdict, guilty; appeal by defendant; affirmed.

78. State v. Stewart, from Brunswick; murder, first degree; verdict, guilty; appeal by defendant; affirmed.

79. State v. Stowe, from Mecklenburg; municipal ordinance; verdict, guilty; appeal by defendant; affirmed.

80. State v. Swindell, from Pasquotank; carnal knowledge of infant female; verdict, guilty; appeal by defendant; affirmed.

81. State v. Williams, from Scotland; murder, first degree; verdict, guilty; appeal by defendant; affirmed.

DOCKETED AND DISMISSED

82. State v. Whithead, from Edgecombe.

83. State v. Fitzhugh Lane, from Wayne.

84. State v. S. L. Parish, from Franklin.

85. State v. Julia McIver, from Wake.

86. State v. Rufus Self, from Forsyth.

87. State v. Ben Reavis, from Harnett.

88. State v. Russell Cobb, from Forsyth.

89. State v. John and Shirley Lowman, from Davidson.

90. State v. John Barrett, from Madison.

91. State v. David Robinson, from Haywood.

AUGUST TERM, 1925

92. State v. Abernethy, from Catawba; municipal ordinance; verdict, guilty; appeal by defendant; affirmed.

93. State v. Allen, from Moore; liquor; verdict, guilty; appeal by defendant; new trial.

94. State v. Ballard, from Gates; murder, first degree; verdict, guilty; appeal by defendant; affirmed.

95. State v. Berry, from Orange; assault with deadly weapon; verdict, guilty; appeal by defendant; new trial.

96. State v. Brodie, from Stokes; arson; verdict, guilty; appeal by defendant; affirmed.

97. State v. Carivey, from Halifax; escape; verdict, guilty; appeal by defendant; affirmed.

98. State v. Cooper, from New Hanover; banking act; verdict, guilty; appeal by defendant; affirmed.

99. State v. Dawkins, from Forsyth; murder, first degree; verdict, guilty; appeal by defendant; affirmed.

100. State v. Edwards, from Hertford; bad check; State appealed; affirmed.

101. State v. Flood, from Edgecombe; liquor; verdict, guilty; appeal by defendant; affirmed.

102. State v. Griffin, from Martin; lynching; verdict, guilty; appeal by defendant; affirmed.

103. State v. Horton, from Gates; liquor; verdict, guilty; appeal by defendant; affirmed.

104. State v. Jackson, from Wake; prostitution; verdict, guilty; appeal by defendant; affirmed.

105. State v. Kline, from Lee; assault with deadly weapon; verdict, guilty; appeal by defendant; new trial.

106. State v. Meyers, from Sampson; liquor; verdict, guilty; appeal by defendant; new trial.

107. State v. Montague, from Burke; rape; verdict, guilty; appeal by defendant; affirmed.

108. State v. Moore, from Montgomery; liquor; verdict, guilty; appeal by defendant; affirmed.

109. State v. Neal, from Forsyth; receiving stolen goods; verdict, guilty; appeal by defendant; affirmed.

110. State v. Richardson, from Wake; prostitution; verdict, guilty; appeal by defendant; affirmed.

111. State v. Sauls, from Wilson; incest; verdict, guilty; appeal by defendant; affirmed.

112. State v. Sigman, from Catawba; liquor; verdict, guilty; appeal by defendant; affirmed.

113. State v. Steele, from Union; murder, first degree; verdict, guilty; appeal by defendant; affirmed.
114. State v. Strickland, from Sampson; liquor; verdict, guilty; appeal by defendant; affirmed.
115. State v. Thompson, from Orange; liquor; verdict, guilty; appeal by defendant; affirmed.
116. State v. Trott, from Catawba; murder, second degree; verdict, guilty; appeal by defendant; affirmed.
117. State v. Tucker, from Iredell; liquor; verdict, guilty; appeal by defendant; new trial.
118. State v. Willie, from Jones; assault with deadly weapon; verdict, guilty; appeal by defendant; affirmed.

DOCKETED AND DISMISSED

119. State v. Davenport, from Tyrrell.
120. State v. H. V. Baker et al., from Perquimans.
121. State v. Albert Royall, from Forsyth.
122. State v. Albert Myers, from Davidson.
123. State v. Sam Howard, from Orange.
124. State v. Ashley Norris, from Harnett.
125. State v. A. A. Fouts, from Davidson.
126. State v. Elvin Sparrow, from Lenoir.
127. State v. Howell Solly, from Orange.
128. State v. Chas. Thomas Gaddy, from Anson.
129. State v. Ed Myers, from Anson.
130. State v. Omar Williams, from Davidson.
131. State v. Cromer, from Stokes.
132. State v. Fletcher, from Guilford.
133. State v. John Qualls, from Davidson.
134. State v. J. A. Hinson, from Richmond.
135. State v. A. D. Cordell, from Buncombe.

FEBRUARY TERM, 1926

136. State v. Adams, from Gates; liquor; verdict, guilty; appeal by defendant; affirmed.
137. State v. Andrews, from Alamance; bus law; special verdict; appeal by State; affirmed.
138. State v. Ballengee, from Caldwell; gaming, judgment arrested.
139. State v. Banks, from Buncombe; jail breaking; verdict, guilty; appeal by defendant; affirmed.

140. State v. Bost, from Cabarrus; manslaughter; verdict, guilty; appeal by defendant; new trial.

141. State v. Brinkley, from Cabarrus; seduction; judgment arrested.

142. State v. Brown, from Duplin; malicious injury; verdict, guilty; appeal by defendant; affirmed.

143. State v. Buck, from Gates; liquor; verdict, guilty; appeal by defendant; affirmed.

144. State v. Corpening, from Caldwell; bad check; special verdict; appeal by State; affirmed.

145. State v. Dail, from Perquimans; larceny; verdict, guilty; appeal by defendant; affirmed.

146. State v. Dail, from Perquimans; accessory before fact; verdict, guilty; appeal by defendant; affirmed.

147. State v. Dail, from Perquimans; larceny; verdict, guilty; appeal by defendant; affirmed.

148. State v. Ferguson, from Halifax; juvenile delinquency; verdict, guilty; appeal by defendant; new trial.

149. State v. Hensley, from Yancey; assault with deadly weapon; verdict, guilty; appeal by defendant; affirmed.

150. State v. Hollingsworth, from Forsyth; false pretense; verdict, guilty; appeal by defendant; new trial.

151. State v. Horne, from Pitt; municipal ordinance; verdict, guilty; appeal by defendant; affirmed.

152. State v. Howard, from Perquimans; burglary, second degree; verdict, guilty; appeal by defendant; affirmed.

153. State v. Jones, from Craven; municipal ordinance; special verdict; appeal by State; affirmed.

154. State v. Jones, from Forsyth; murder, first degree; verdict, guilty; appeal by defendant; affirmed.

155. State v. Lakey, from Forsyth; municipal ordinance; verdict, guilty; appeal by defendant; affirmed.

156. State v. Lassiter, from Gates; bribery; verdict, guilty; appeal by defendant; new trial.

157. State v. Luquire, from Wake; liquor; verdict, guilty; appeal by defendant; affirmed.

158. State v. Mansel, from Buncombe; rape; verdict, guilty; appeal by defendant; affirmed.

159. State v. Matthews, from Harnett; murder, first degree; verdict, guilty; appeal by defendant; new trial.

160. State v. Maulsby, from Brunswick; tick eradication; verdict, guilty; appeal by defendant; affirmed.

161. State v. Messer, from Haywood; manslaughter; verdict, guilty; appeal by defendant; affirmed.

162. State v. Prytle, from Catawba; murder, second degree; verdict, guilty; appeal by defendant; new trial.

163. State v. Rawlings, from Perquimans; automobile law; verdict, guilty; appeal by defendant; new trial.

164. State v. Rogers, from Davidson; liquor; verdict, guilty; appeal by defendant; affirmed.

165. State v. Simmerson, from Forsyth; assault with deadly weapon; verdict, guilty; appeal by defendant; new trial.

166. State v. Whaley, from Lenoir; automobile law; verdict, guilty; appeal by defendant; new trial.

167. State v. Whitener, from Guilford; murder, first degree; verdict, guilty; appeal by defendant; new trial.

168. State v. Wooten, from Watauga; manslaughter; verdict, guilty; appeal by defendant; affirmed.

DOCKETED AND DISMISSED

169. State v. J. E. Blackburn, etc., from Wayne.

170. State v. J. E. Blackburn, etc., from Wayne.

171. State v. J. E. Blackburn, etc., from Wayne.

172. State v. J. E. Blackburn, etc., from Wayne.

173. State v. Mode Twine, from Gates.

174. State v. Percy B. Kyles, from Forsyth.

175. State v. Robert Snider, from Davidson.

176. State v. Ernest Fletcher, from Guilford.

177. State v. Willie Trotter, from Davidson.

178. State v. S. G. Pappas, from Buncombe.

179. State v. Thomas Humphries, from Buncombe.

180. State v. Lillie Jackson, from Buncombe.

181. State v. Ed Smathers, from Jackson.

SUMMARY OF CASES

Affirmed on defendant's appeal	90
New trial or reversed on defendant's appeal	27
Affirmed on State's appeal	3
Reversed on State's appeal	1
Motion to reinstate denied	2
Judgment arrested	2
Appeal dismissed	56
Total	181

CRIMINAL STATISTICS

STATEMENT A

THE FOLLOWING STATEMENT SHOWS THE CRIMINAL CASES DISPOSED OF DURING THE FALL TERM, 1924, AND SPRING TERM, 1925

Counties	White	Colored	Indian	Male	Female	Convicted	Acquitted	Nolle pros.	Otherwise Disposed of	Total as to Counties
Alamance.....	155	97	-----	242	10	170	32	48	2	252
Alexander.....	52	5	-----	54	3	48	8	-----	1	57
Alleghany.....	29	4	-----	31	2	28	5	-----	-----	33
Anson.....	50	136	-----	182	4	117	22	47	-----	186
Ashe.....	66	-----	-----	65	1	61	3	-----	2	66
Avery.....	49	2	-----	46	5	43	8	-----	-----	51
Beaufort.....	30	41	-----	69	2	69	2	-----	-----	71
Bertie.....	34	147	-----	176	5	134	22	25	-----	181
Bladen.....	14	26	-----	40	-----	40	-----	-----	-----	40
Brunswick.....	9	23	-----	31	1	30	2	-----	-----	32
Buncombe.....	478	167	-----	570	75	445	-----	200	-----	645
Burke.....	115	30	-----	140	5	141	2	-----	2	145
Cabarrus.....	150	59	-----	200	9	140	22	47	-----	209
Caldwell.....	49	19	-----	66	2	65	3	-----	-----	68
Camden.....	8	7	-----	15	-----	11	2	2	-----	15
Carteret.....	15	28	-----	39	4	42	-----	1	-----	43
Caswell.....	40	39	-----	77	2	77	2	-----	-----	79
Catawba.....	125	21	-----	139	7	142	2	2	-----	146
Chatham.....	90	102	-----	180	12	147	27	15	3	192
Cherokee.....	89	6	1	95	1	77	16	3	-----	96
Chowan.....	12	14	-----	25	1	20	6	-----	-----	26
Clay.....	35	7	-----	39	3	24	5	13	-----	42
Cleveland.....	84	30	-----	111	3	76	24	14	-----	114
Columbus.....	107	53	-----	157	3	97	43	20	-----	160
Craven.....	40	50	-----	86	4	42	26	20	2	90
Cumberland.....	85	55	1	133	8	91	23	25	2	141
Currituck.....	1	6	-----	7	-----	7	-----	-----	-----	7
Dare.....	20	7	-----	24	3	26	-----	1	-----	27
Davidson.....	112	43	-----	152	3	136	12	7	-----	155
Davie.....	35	9	-----	40	4	38	1	5	-----	44
Duplin.....	150	130	-----	258	22	149	51	78	2	280
Durham.....	251	195	-----	412	34	245	66	134	1	446
Edgecombe.....	39	103	-----	134	8	114	16	12	-----	142
Forsyth.....	349	288	-----	566	71	523	49	60	5	637
Franklin.....	31	34	-----	64	1	47	14	4	-----	65
Gaston.....	273	76	-----	331	18	315	-----	34	-----	349
Gates.....	22	47	-----	65	4	51	11	7	-----	69
Graham.....	26	-----	-----	25	1	9	-----	17	-----	26
Granville.....	47	80	-----	122	5	91	14	22	-----	127
Greene.....	23	27	-----	48	2	30	13	6	1	50
Guilford.....	260	221	-----	439	42	322	56	96	7	481
Halifax.....	65	155	-----	214	6	220	-----	-----	-----	220
Harnett.....	70	27	-----	95	2	70	14	11	2	97
Haywood.....	198	14	-----	193	19	78	27	103	4	212
Henderson.....	76	28	-----	95	9	88	9	7	-----	104
Hertford.....	35	77	-----	109	3	76	22	14	-----	112
Hoke.....	12	24	2	38	-----	26	10	2	-----	38
Hyde.....	32	25	-----	57	-----	49	2	6	-----	57

STATEMENT A—Continued

Counties	White	Colored	Indian	Male	Female	Convicted	Acquitted	Nolle pros.	Otherwise Disposed of	Total as to Counties
Iredell.....	50	26	-----	71	5	54	8	14	-----	76
Jackson.....	27	-----	-----	27	-----	19	2	6	-----	27
Johnston.....	55	42	-----	93	4	69	21	6	1	97
Jones.....	18	40	-----	57	1	49	6	3	-----	58
Lee.....	67	117	-----	182	2	152	14	18	-----	184
Lenoir.....	66	103	-----	145	24	113	33	23	-----	169
Lincoln.....	122	11	-----	130	3	92	5	36	-----	133
Macon.....	67	1	-----	67	1	51	5	12	-----	68
Madison.....	82	6	-----	83	5	87	1	-----	-----	88
Martin.....	32	11	-----	43	-----	43	-----	-----	-----	43
McDowell.....	112	19	-----	122	9	79	15	36	1	131
Mecklenburg*.....	643	519	-----	1,065	97	733	78	338	17	1,166
Mitchell.....	71	2	-----	70	3	46	5	22	-----	73
Montgomery.....	114	57	-----	164	7	101	23	47	-----	171
Moore.....	47	102	-----	143	6	106	10	31	2	149
Nash.....	76	85	-----	152	9	87	15	59	-----	161
New Hanover.....	44	94	-----	126	12	138	-----	-----	-----	138
Northampton.....	21	98	-----	115	4	64	33	21	1	119
Onslow.....	20	30	-----	47	3	47	3	-----	-----	50
Orange.....	74	104	-----	172	6	134	12	32	-----	178
Pamlico.....	13	23	-----	35	1	34	2	-----	-----	36
Pasquotank.....	35	23	-----	58	-----	45	13	-----	-----	58
Pender.....	36	60	-----	85	11	65	9	21	1	96
Perquimans.....	24	99	-----	107	16	104	12	7	-----	123
Person.....	59	46	-----	104	1	105	-----	-----	-----	105
Pitt.....	50	87	-----	131	6	89	29	19	-----	137
Polk.....	55	22	-----	72	5	43	3	27	4	77
Randolph.....	190	77	-----	260	7	138	17	111	1	267
Richmond.....	123	91	-----	210	4	160	22	32	-----	214
Robeson.....	45	56	72	167	6	94	12	67	-----	173
Rockingham.....	76	78	-----	151	3	147	7	-----	-----	154
Rowan.....	55	34	-----	83	6	75	3	9	2	89
Rutherford.....	93	19	-----	106	6	88	23	1	-----	112
Sampson.....	148	109	-----	246	11	204	28	25	-----	257
Scotland.....	20	42	5	67	-----	50	10	6	1	67
Stanly.....	16	17	-----	30	3	33	-----	-----	-----	33
Stokes.....	71	28	-----	95	4	79	11	9	-----	99
Surry.....	159	14	-----	165	8	140	19	12	2	173
Swain.....	50	7	4	57	4	44	17	-----	-----	61
Transylvania.....	100	21	-----	116	5	93	16	10	2	121
Tyrrell.....	32	28	-----	60	-----	43	9	8	-----	60
Union.....	18	35	-----	50	3	27	13	9	4	53
Vance.....	73	54	-----	123	4	75	22	30	-----	127
Wake.....	434	492	-----	866	60	648	130	144	5	927
Warren.....	13	27	-----	39	1	23	11	6	-----	40
Washington.....	9	18	-----	26	1	20	3	4	-----	27
Watauga.....	94	8	-----	99	3	71	3	27	1	102
Wayne.....	26	59	-----	79	6	84	1	-----	-----	85
Wilkes.....	208	34	-----	214	28	156	12	74	-----	242
Wilson.....	125	156	-----	217	64	133	25	123	-----	281
Yadkin.....	55	7	-----	59	3	62	-----	-----	-----	62
Yancey.....	44	-----	-----	44	-----	22	6	16	-----	44
5 Corporations.....	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----
Totals.....	8,494	6,122	85	13,791	910	10,545	1,471	2,609	81	14,706

* 4 Corporations.

† 1 Corporation.

Recapitulation of Statement A

TOTAL NUMBER CRIMINAL ACTIONS DISPOSED OF		14,706
Males.....	13,791	
Females	910	
Corporations.....	5	
Total.....		14,706
White	8,494	
Colored.....	6,122	
Indians.....	85	
Corporations.....	5	
Total.....		14,706
Convictions, including submissions.....	10,545	
Acquitted.....	1,471	
Nolle pros.....	2,609	
Otherwise disposed of.....	81	
Total.....		14,706

STATEMENT B

THE FOLLOWING STATEMENT SHOWS THE OFFENSES WITH WHICH DEFENDANTS WERE CHARGED IN THE VARIOUS COUNTIES OF THE STATE DURING THE FALL TERM, 1924 AND SPRING TERM, 1925.

Counties	Abandonment	Abduction	Abortion	Affray	Arson	Assault and Battery	Assault with Deadly Weapons	Assault with Intent to Rape	Attempt to Burn Dwelling	Attempt to Poison	Bastardy	Bigamy	Bribery	Burglary	Burglary—First Degree	Burglary—Second Degree	Burning other than Arson
Alamance.....	6	1				23				1		1				1	
Alexander.....				7	1		11									3	
Alleghany.....				3		4	2										
Anson.....	4	1		5		4	12	4					1				
Ashe.....	1			3		4	14										
Avery.....	1					6	3	1									1
Beaufort.....						1	10										
Bertie.....	1			28		9	36										
Bladen.....	2					2	7										
Brunswick.....						2										1	
Buncombe.....	19					34	57	3				2				1	
Burke.....	4			5		11	14				1	1					
Cabarrus.....	5	2	1	2		9	27	1									
Caldwell.....	1					2	9										
Camden.....						1	2										
Carteret.....	1			5		2	1					1					
Caswell.....	2			2			12										
Catawba.....	1			5		1	9										
Chatham.....	1			9		21	4	1									
Cherokee.....				3		8	11					1				1	1
Chowan.....				1		2	4	1								1	
Clay.....	1					1	2	1								1	
Cleveland.....	1					4	5	1									
Columbus.....	1					7	30	1									
Craven.....					2	3	7	2				2					

[illegible]

[illegible]

STATEMENT B—Continued

Counties	Carrying Concealed Weapons	Compounding Felony	Concealing Birth of Child	Conspiracy	Counterfeiting	Cruelty to Animals	Disorderly House	Disposing Mortgaged Property	Disturbing Meetings	Election Laws	Embezzlement	Escape	Failure to List Taxes	Failure to Work Public Road	False Pretense	Fish and Game Laws	Food and Drug Laws
Alamance.....	12						19	4							2		
Alexander.....							4								1		
Alleghany.....			2											1			
Anson.....	14					2	2		2			1			1		
Ashe.....	12					1		1	3								
Avery.....	3														1		
Beaufort.....	3										1						
Bertie.....	25					1	1		2		1						
Bladen.....	2					1			17								
Brunswick.....																	
Buncombe.....	17						15		1						1		
Burke.....	13						3	5	4		12	8			13		
Cabarrus.....	11					2		6			1	1			2		
Caldwell.....	2											1			1		
Camden.....	1					1			2								
Carteret.....	2						2										
Caswell.....	10						2		3								
Catawba.....	11						6										
Chatham.....	10						3	2	1		1				1		
Cherokee.....	12								4								
Chowan.....	5						1									1	
Clay.....	4								4								
Cleveland.....	8						4										
Columbus.....	10							8			1				2	2	
Craven.....	3					1	2	2							3		
Cumberland.....									1								
Currituck.....	3						1				3				1		

[illegible]

STATEMENT B—Continued

Counties	Carrying Concealed Weapons	Compounding Felony	Concealing Birth of Child	Conspiracy	Counterfeiting	Cruelty to Animals	Disorderly House	Disposing Mortgaged Property	Disturbing Meetings	Election Laws	Embezzlement	Escape	Failure to List Taxes	Failure to Work Public Road	False Pretense	Fish and Game Laws	Food and Drug Laws
New Hanover.....	3					1	1		10		1				1		
Northampton.....	15						2										
Onslow.....	2						1					1					
Orange.....	8								1								
Pamlico.....	1															1	
Pasquotank.....	5																
Pender.....	4					1					1	1		2	1	1	
Perquimans.....	7		2				1		5		1				1	1	
Person.....	8					1		1	1		1						
Pitt.....	9							2	1		3				6		
Polk.....	4						5		2								
Randolph.....	7			3			2	1				8			1	1	
Richmond.....	27						3				2	6			3		
Robeson.....	10					1		3			2	1			5		
Rockingham.....	4																
Rowan.....	4										1						
Rutherford.....																	
Sampson.....	10					1	6	5	1		2				4	3	
Scotland.....	2						5										
Stanly.....											1	1					
Stokes.....	6						1	1									
Surry.....	7						2	2	2		1						
Swain.....	6															1	
Transylvania.....	12							1	5			4				1	
Tyrrell.....	1							1				6		30			
Union.....	3										1				3		
Vance.....	2						2	2	2						3		

[illegible]

STATEMENT B—Continued

Countries	Forcible Trespass	Forgery	Fornication and Adultery	Gambling or Lottery	Health Laws	Housebreaking	House Burning	Incest	Injury to Property	Intoxicating Liquors	Larceny and Receiving	Libel	License, Practicing Profession Without	License, Doing Busi- ness Without	Manslaughter	Military Laws	Municipal Ordinances
Alamance.....		1	7	13		6		1		65	56						
Alexander.....	1					2				19							
Alleghany.....	7										3						
Anson.....				12		11		1	1	65	23				1		
Ashe.....	6									13	2			1			
Avery.....			2							19	8						
Beaufort.....	1	8		1		8				20	3						
Bertie.....	1			3		11			3	24	7				1		
Bladen.....		2	1							11	7						
Brunswick.....										16	4				2		
Buncombe.....	1	8	22	15	1	32			3	221	72				3		
Burke.....			9	4						60	1						
Cabarrus.....	4		7	21		17		2		47	30		1				
Caldwell.....	1	1	4	4		3	1			25	8						
Camden.....										4	1						
Carteret.....									1	25	1				1		
Caswell.....	1					1				36	1						1
Catawba.....		2	3	4						74	19				1		
Chatham.....			10			8			2	85	25						
Cherokee.....				3					3	42	4						
Chowan.....																	
Clay.....										24	2						
Cleveland.....	4	5	4	2		9		1		31	13				2		
Columbus.....	2	9		6		4	1			22	16						
Craven.....	2		3			9				11	15				1		
Cumberland.....		6				8			2	16	46				2		3

[illegible]

STATEMENT B—Continued

Counties	Forcible Trespass	Forgery	Fornication and Adultery	Gambling or Lottery	Health Laws	Housebreaking	House Burning	Incest	Injury to Property	Intoxicating Liquors	Larceny and Receiving	Libel	Licenses, Practicing Profession Without	Licenses, Doing Busi- ness Without	Manlaughter	Military Laws	Municipal Ordinances
New Hanover	7		4	6		8				42	20				2		
Northampton	1		2							33	7			1	3		
Onslow			2			1				8							
Orange		2		6		10				59	29				2		
Pamlico	1									11	1						
Pasquotank	2	2				7				10	3						1
Pender		1		7		3	1		8	21	10						
Perquimans				26						31	13						
Person	1			15						50				1			
Pitt		3	3			1			2	27	32				1		
Polk	2					2				33	8				1		
Randolph	1	4	10	11		3	1		3	100	21			1	1		
Richmond	1	4		14						54			1				1
Robeson	1	3	1	1	1	5	1	2		23	20				2		
Rockingham	6	4		11		7		1	2	78	16				1		1
Rowan						9			1	13	30			2			
Rutherford	7	4	7							77	9				1		
Sampson	5	11	7	3		3				106	25						
Scotland		12	1	1		6				7	13						
Stanly		1	1			8				2	6				1		
Stokes	1					9	1		1	36	5				4		
Surry	9		1			7				71	18				1		1
Swain						1				24	7						
Tyrrell		5		3						44	9				1		
Transylvania		2								8							
Union	1		1			1				9	7						

Vance.....	2	2	1	5	1	39	20	1	1	21
Wake.....	12	45	26	43	1	279	154	2	4	
Warren.....	1	1		3		6	7			
Washington.....	1					9	2		1	
Watauga.....	1	1	4	4		36	8	1	1	
Wayne.....	1	1	1	5		16	29		1	
Wilkes.....	2	7	20	8		56	24	2	1	
Wilson.....	2	5	1	17	2	53	58		1	
Yadkin.....				13		18	2			
Yancey.....	1					18	1			
Totals.....	158	309	231	618	18	4,480	1,915	1	84	21

STATEMENT B—Continued

Counties	Murder— First Degree	Murder— Second Degree	Nuisance	Obstructing Public Highway	Obstructing River	Official Misconduct	Perjury	Rape	Resisting Officer	Riot	Robbery	School Laws	Seduction	Slander	Trespass	Miscellaneous	Total as to Counties
Alamance									1		3		2		2	16	252
Alexander		1	1				1		1				1			11	57
Alleghany		2	1											1	2		33
Anson	1								4		5			1		8	186
Ashe			1						2							2	66
Avery												2			1		51
Beaufort																	4
Bertie		2							2							8	71
Bladen		2							1				3	4		2	181
Brunswick		1											1			3	40
Buncombe		5		1					3		8	1	1	2	10	47	32
Burke		2		1					3				1	1		7	645
Cabarrus		2	4						1		1			1		1	145
Caldwell									3				1			1	209
Camden																	68
Carteret		1													2	4	15
Caswell			3						1				1			3	43
Catawba															2		79
Chatham		2													3	3	146
Cherokee																7	192
Chowan		4							3								96
Clay	2																26
Cleveland		2														2	42
Columbus		4							1		1		2			12	114
Craven	1								2				6	1	4	16	160
Cumberland		5									8					12	90
		8							1		6		2		1	11	141

STATEMENT B—Continued

Counties	Murder— First Degree	Murder— Degree Second	Nuisance	Obstructing Public Highway	Obstructing River	Official Misconduct	Perjury	Rape	Resisting Officer	Riot	Robbery	School Laws	Seduction	Slander	Trespass	Miscellaneous	Totals as to Counties
Nash.....	1	8	—	—	—	—	1	—	—	—	—	1	1	1	2	17	161
New Hanover.....	—	—	5	—	—	1	3	—	—	—	2	—	—	—	—	13	138
Northampton.....	—	2	—	—	—	—	—	—	—	—	1	—	1	—	—	5	119
Onslow.....	—	—	3	—	—	—	—	—	—	—	—	—	—	—	—	4	50
Orange.....	—	1	—	—	—	—	—	—	4	—	1	—	—	—	2	13	178
Panlico.....	—	1	—	—	—	—	—	—	—	—	—	—	—	—	—	3	36
Pasquotank.....	—	1	—	—	—	—	—	—	—	—	—	—	—	—	—	20	58
Pender.....	—	—	—	2	—	—	—	1	—	—	—	1	—	—	6	5	96
Perquimans.....	—	—	1	—	—	—	—	—	1	—	—	—	—	—	—	5	123
Person.....	—	1	—	—	—	—	1	—	3	—	—	—	—	—	—	4	105
Pitt.....	—	3	—	—	—	3	—	—	1	—	—	—	—	—	1	18	137
Polk.....	—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	1	77
Randolph.....	—	5	5	—	—	—	—	—	8	—	6	—	2	1	2	7	267
Richmond.....	—	4	—	—	—	—	2	1	1	—	—	—	—	—	1	10	214
Robeson.....	1	16	4	—	—	—	—	—	9	—	1	—	1	—	1	13	173
Rockingham.....	—	3	—	—	—	—	—	—	—	—	—	—	—	—	—	2	154
Rowan.....	—	1	1	—	—	—	—	—	—	—	—	—	—	—	—	8	89
Rutherford.....	—	1	—	—	—	—	—	—	—	—	—	—	—	—	—	2	112
Sampson.....	—	1	2	—	—	—	—	—	2	—	—	—	2	—	—	9	257
Scotland.....	—	9	—	—	—	—	—	—	—	—	—	—	—	—	—	4	67
Stanly.....	1	3	—	—	—	—	—	—	—	—	—	—	—	—	—	—	33
Stokes.....	—	1	—	—	—	—	—	—	—	—	—	—	—	—	—	—	99
Surry.....	—	—	1	—	—	—	—	—	1	—	—	—	2	1	—	4	173
Swain.....	—	1	—	1	—	—	—	—	—	—	—	—	—	—	—	2	61
Transylvania.....	—	1	5	—	—	—	—	—	1	—	—	—	—	—	3	6	121
Tyrrell.....	—	1	—	—	—	—	—	—	1	—	—	—	—	—	—	2	60

[illegible]

STATEMENT C

THE FOLLOWING STATEMENT SHOWS THE CRIMINAL CASES DISPOSED OF DURING THE
FALL TERM, 1925, AND SPRING TERM, 1926

Counties	White	Colored	Indian	Male	Female	Convicted	Acquitted	Nolle pros.	Otherwise Disposed of	Totals as to Counties
Alamance.....	127	72	-----	188	11	156	18	25	-----	199
Alexander.....	55	6	-----	61	-----	61	-----	-----	-----	61
Alleghany.....	21	1	-----	19	3	17	2	3	-----	22
Anson ¹	75	154	-----	227	2	147	20	64	3	234
Ashe.....	76	2	-----	74	4	68	8	1	1	78
Avery.....	60	5	-----	58	7	54	8	3	-----	65
Beaufort.....	18	19	-----	35	2	31	6	-----	-----	37
Bertie.....	27	130	-----	142	15	117	22	17	1	157
Bladen.....	6	14	-----	20	-----	20	-----	-----	-----	20
Brunswick.....	24	9	-----	31	2	14	16	3	-----	33
Buncombe.....	611	214	-----	761	64	586	34	205	-----	825
Burke.....	141	39	-----	178	2	129	9	42	-----	180
Cabarrus.....	67	42	-----	106	3	82	12	14	1	109
Caldwell.....	94	24	-----	113	5	109	2	5	2	118
Camden.....	8	7	-----	14	1	5	3	7	-----	15
Carteret.....	21	21	-----	42	-----	42	-----	-----	-----	42
Caswell.....	13	11	-----	24	-----	18	2	4	-----	24
Catawba.....	136	17	-----	148	5	140	1	12	-----	153
Chatham.....	92	83	-----	173	7	144	7	29	-----	180
Cherokee.....	34	3	2	39	-----	20	7	11	1	39
Chowan.....	13	11	-----	24	-----	20	4	-----	-----	24
Clay.....	64	6	-----	69	1	27	6	37	-----	70
Cleveland.....	99	22	-----	116	5	81	9	25	6	121
Columbus.....	188	90	-----	269	9	190	43	33	12	278
Craven.....	17	43	-----	53	7	36	7	17	-----	60
Cumberland.....	101	80	1	174	8	99	43	40	-----	182
Currituck.....	21	12	-----	31	2	21	10	2	-----	33
Dare.....	15	11	-----	22	4	19	3	4	-----	26
Davidson.....	146	43	-----	178	11	162	7	15	5	189
Davie.....	35	16	-----	47	4	36	7	8	-----	51
Duplin.....	90	134	1	219	6	135	21	68	1	225
Durham ²	236	177	-----	375	38	264	37	105	8	414
Edgecombe.....	63	104	-----	152	15	91	22	54	-----	167
Forsyth.....	273	208	-----	460	21	418	51	11	1	481
Franklin.....	32	37	-----	68	1	44	4	20	1	69
Gaston.....	393	83	-----	447	29	285	32	158	1	476
Gates.....	23	33	-----	55	1	38	7	11	-----	56
Graham.....	21	-----	-----	20	1	11	2	8	-----	21
Granville.....	47	89	-----	131	5	89	21	23	3	136
Greene.....	15	37	-----	51	1	34	15	3	-----	52
Guilford ³	233	164	-----	374	23	330	22	44	2	398
Halifax.....	82	190	-----	258	14	208	36	27	1	272
Harnett.....	67	41	-----	102	6	67	13	28	-----	108
Haywood.....	102	6	-----	98	10	43	22	43	-----	108
Henderson.....	128	67	-----	181	14	131	11	49	4	195
Hertford.....	49	84	-----	125	8	76	20	37	-----	133
Hoke.....	6	23	1	28	2	19	8	1	2	30
Hyde.....	6	29	-----	26	9	25	-----	10	-----	35
Iredell.....	34	23	-----	56	1	41	4	12	-----	57
Jackson.....	57	7	-----	63	1	33	15	15	1	64
Johnston.....	50	36	-----	84	2	64	13	9	-----	86
Jones.....	26	41	-----	63	4	56	4	7	-----	67

STATEMENT C—Continued

Counties	White	Colored	Indian	Male	Female	Convicted	Acquitted	Nolle pros.	Otherwise Disposed of	Totals as to Counties
Lee.....	73	82	-----	152	3	124	19	12	-----	155
Lenoir.....	128	77	-----	188	17	116	43	46	-----	205
Lincoln.....	108	30	-----	134	4	101	11	25	1	138
McDowell.....	156	38	-----	188	6	137	10	47	-----	194
Macon.....	115	10	-----	118	7	74	13	38	-----	125
Madison.....	73	5	-----	75	3	74	-----	-----	4	78
Martin.....	8	9	-----	15	2	13	2	2	-----	17
Mecklenburg.....	607	518	-----	1,039	86	677	102	335	11	1,125
Mitchell.....	82	-----	-----	81	1	36	3	42	1	82
Montgomery.....	65	48	-----	108	5	65	21	27	-----	113
Moore.....	63	40	1	102	2	36	6	61	1	104
Nash.....	56	76	-----	123	9	63	30	37	2	132
New Hanover.....	25	57	-----	79	3	82	-----	-----	-----	82
Northampton.....	43	89	-----	128	4	76	30	24	2	132
Onslow.....	62	56	-----	113	5	118	-----	-----	-----	118
Orange.....	155	126	-----	273	8	170	18	75	18	281
Pamlico.....	27	29	-----	52	4	32	7	17	-----	56
Pasquotank.....	18	8	-----	25	1	21	5	-----	-----	26
Pender.....	28	35	-----	60	3	33	11	18	1	63
Perquimans.....	34	81	-----	113	2	84	8	23	-----	115
Person.....	68	69	1	127	11	89	20	29	-----	138
Pitt.....	106	131	-----	225	12	130	56	51	-----	237
Polk.....	135	36	-----	157	14	117	10	42	2	171
Randolph.....	294	73	-----	355	12	198	15	152	2	367
Richmond.....	133	78	-----	206	5	138	10	60	3	211
Robeson.....	93	64	47	202	2	117	35	52	-----	204
Rockingham.....	65	42	-----	102	5	86	11	10	-----	107
Rowan.....	42	26	-----	63	5	64	4	-----	-----	68
Rutherford.....	39	15	-----	52	2	43	8	3	-----	54
Sampson.....	169	149	-----	307	11	222	47	49	-----	318
Scotland.....	27	13	-----	40	-----	24	10	6	-----	40
Stanly.....	46	17	-----	62	1	55	5	2	1	63
Stokes.....	57	16	-----	72	1	64	6	3	-----	73
Surry.....	161	16	-----	173	4	161	15	1	-----	177
Swain.....	97	1	16	109	5	57	30	27	-----	114
Transylvania.....	123	47	-----	162	8	141	29	-----	-----	170
Tyrrell.....	6	4	-----	10	-----	6	-----	4	-----	10
Union ¹	27	28	-----	52	3	32	6	17	1	56
Vance.....	55	52	-----	100	7	71	20	16	-----	107
Wake ⁵	296	378	-----	634	40	419	131	124	3	677
Warren.....	20	44	-----	58	6	42	10	12	-----	64
Washington.....	7	13	-----	18	2	9	7	4	-----	20
Watauga.....	76	8	-----	80	4	62	2	19	1	84
Wayne.....	40	64	-----	95	9	95	3	6	-----	104
Wilkes.....	350	28	-----	339	39	214	37	123	4	378
Wilson.....	164	198	-----	321	41	183	41	136	2	362
Yadkin.....	68	8	-----	74	2	66	6	4	-----	76
Yancey.....	85	2	-----	86	1	41	14	30	2	87
Totals.....	9,213	5,859	70	14,319	823	10,231	1,623	3,180	119	15,153

¹ 5 Corporations. ² 1 Corporation. ³ 1 Corporation. ⁴ 1 Corporation. ⁵ 3 Corporations.

Recapitulation of Statement C

TOTAL NUMBER OF CRIMINAL ACTIONS DISPOSED OF.....	-----	15,153
Males.....	14,319	
Females.....	823	
Corporations.....	11	
Total.....	-----	15,153
White.....	9,213	
Colored.....	5,859	
Indians.....	70	
Corporations.....	11	
Total.....	-----	15,153
Convictions, including submissions.....	10,231	
Acquitted.....	1,623	
Nolle pros.....	3,180	
Otherwise disposed of.....	119	
Total.....	-----	15,153

STATEMENT D

THE FOLLOWING STATEMENT SHOWS THE OFFENSES WITH WHICH DEFENDANTS WERE CHARGED IN THE VARIOUS COUNTIES OF THE STATE DURING THE FALL TERM, 1925, AND SPRING TERM, 1926.

Counties	Abandonment	Abduction	Abortion	Alfraz	Arson	Assault and Battery	Assault with Deadly Weapons	Assault with Intent to Rape	Attempt to Burn Dwelling	Attempt to Poison	Bastardy	Bigamy	Bribery	Burgery	Burglary—First Degree	Burglary—Second Degree	Burning other than Arson
Alamance	4			4		37	11					1				1	
Alexander						4	3										
Alleghany																	
Anson	1			10	2	1	17	2				3					
Ashe				4		1	3										
Avery						1	10									2	
Beaufort				1			6										1
Bertie	3	1		16		2	33	1									
Bladen						4	1										
Brunswick						1	4										
Buncombe	18			6		51	67	1								1	
Burke	3	2		2		3	31	1									
Cabarrus	2			3	1	1	13										
Caldwell	1			3		9	27										
Camden						1	1					1					
Carteret						1	3										
Caswell							2	2				1					
Catawba	1			1		5	14									1	
Chatham	3			1		8	21	1									
Cherokee	3					2	4									1	
Chowan						6											
Clay	1						3										
Cleveland	3			1		4	1	1				1					1
Columbus	2	1				7	33										2
Craven						3	7										
Cumberland	5	8				14	5	2				2					

STATEMENT D—Continued

Counties	Abandonment	Abduction	Abortion	Affray	Arson	Assault and Battery	Assault with Deadly Weapons	Assault with Intent to Rape	Attempt to Burn Dwelling	Attempt to Poison	Bestardy	Bigamy	Bribery	Buggery	Burglary—First Degree	Burglary—Second Degree	Burning other than Arson
Union.....	1	1					1	1				1					
Vance.....	4	1				14	2										
Wake.....	15	4		8		15	67	6				1				1	1
Warren.....	1	1				3	1	3								1	
Washington.....						1	3										
Watauga.....	1			2			8	1									
Wayne.....					1	12	4	1									
Wilkes.....	5			4		8	44	3								2	
Wilson.....	2	1			1	6	25	1				1					
Yadkin.....						2	12										
Yancey.....	2			1		5	19	1									
Totals.....	205	43	4	214	16	69	1,332	59			2	41	5	2		46	13

STATEMENT D—Continued

Counties	Carrying Concealed Weapons	Compounding Felony	Concealing Birth of Child	Conspiracy	Counterfeiting	Cruelty to Animals	Disorderly House	Disposing Mortgaged Property	Disturbing Meetings	Election Laws	Embzelement	Escape	Failure to List Taxes	Failure to Work Public Road	False Pretense	Fish and Game Laws	Food and Drug Laws
Alamance.....	12						11	7			2	1			6		
Alexander.....							4					2			1		
Alleghany.....	2					1		1	2					1			
Anson.....	19								4			2					
Ashe.....	7								1			2			5		
Avery.....	5						1		1		1	3			2		
Beaufort.....	1							2									
Bertie.....	9					1	1	2	2			1					
Bladen.....	1																
Brunswick.....	1					1											
Buncombe.....	20						9	3	2		9				10	1	
Burke.....	6						4	2	2						2	2	
Cabarrus.....	4							5							3	3	
Caldwell.....	2																
Camden.....																	
Carters.....	2											1			1	1	
Caswell.....	1															12	
Catawba.....	2					2											
Chatham.....	9						1	2									
Cherokee.....	2						1										
Chowan.....	1																
Clay.....	3																
Cleveland.....	3										3	1		1	2		
Columbus.....	12					1	2	4	2		1				1		
Craven.....								2									
Cumberland.....	1						2				3				1	2	

STATEMENT D—Continued

Counties	Carrying Concealed Weapons	Compounding Felony	Concealing Birth of Child	Conspiracy	Counterfeiting	Cruelty to Animals	Disorderly House	Disposing Mortgaged Property	Disturbing Meetings	Election Laws	Embezzlement	Escape	Failure to List Taxes	Failure to Work Public Road	False Pretense	Fish and Game Laws	Food and Drug Laws
Currituck																	
Dare								1			1			1	2		
Davidson	6						8	1			2				2		
Davis	2					1											
Duplin	14					1	2	3	4					19	2	3	
Durham	8						25			3	1	4	1		6		
Edgecombe	2			27							1	1			4		
Forsyth	19							1			5				8		
Franklin	3						2					3			1		
Gaston	18	1				1	14	1	1		3				8		
Gates	2					1		3							1		
Graham	3															3	
Granville	14						1	3	1		1	1	1		2		
Greene	3					1		8			1						
Guilford	9			2			1				5	1			4		
Halifax	16	1				1	1	2		1	1	2			1		
Harnett	1							4			1				3		
Haywood	4										1	1					
Henderson	16			2			3	1	5		3			1	2		
Hertford	9							2			1	2					
Hoke	1																
Hyde	1								5								
Iredell								1			1				2		
Jackson	4							1			1				3		
Johnston	1					1					1	2				1	
Jones	1								7								

Lee.....	8					1	16		2	2	6			2	
Lenoir.....	2								1	2	1			1	
Lincoln.....	2														
Macon.....	14						2		1	4	1			1	
Madison.....	5									3					
Martin.....															
McDowell.....	14										1			3	1
Mecklenburg.....	36							9	9	2	7	2		18	
Mitchell.....	6			2				1							1
Montgomery.....	6								1	2					
Moore.....	4							2	1		1			2	
Nash.....	7							2	3	1				7	
New Hanover.....								1			1			1	
Northampton.....	9						4	1		11					5
Onslow.....	4						1	4		6		1			
Orange.....	16								1		3		4		
Pamlico.....	4						1			2				2	
Pasquotank.....								1			2				1
Pender.....							1	1	2					2	
Perquimans.....	5							2	1	1	3	3		6	
Person.....	5							2	2	2				2	
Pitt.....	6								1	5	1	1		3	
Polk.....	13							4	2					2	
Randolph.....	21			1			1	3	4	1	1				
Richmond.....	12						1	1	2	1	13			6	
Robeson.....	8							1	6	1	1			3	
Rockingham.....	1										2			1	
Rowan.....	1							1							
Rutherford.....	1							1	1						
Sampson.....	18						3	5	12	5	2	3		2	
Scotland.....	1													1	
Stanly.....											2			1	
Stokes.....	7							1	1			2			
Surry.....	5								1	1	1			1	
Swain.....	11								1	1				1	
Sylvania.....	11									4		1			
Tyrrell.....	2						1		1					1	

STATEMENT D—Continued

Counties	Carrying Concealed Weapons	Compounding Felony	Concealing Birth of Child	Conspiracy	Counterfeiting	Cruelty to Animals	Disorderly House	Disposing Mortgaged Property	Disturbing Meetings	Election Laws	Embezzlement	Escape	Failure to List Taxes	Failure to Work Public Road	False Pretense	Fish and Game Laws	Food and Drug Laws
Union	5						2	2					7				
Yancey			1				2	1			3		1		2		
Wake	32						21	3	1		4	7			13		
Warren	1		2					4	1		1		1		2		
Washington																	
Watauga	7																
Wayne							4				2						
Wilkes	22			13		1	25		15		1				2		
Wilson	5					1	19	3			6				2		1
Yadkin	1					1									6		
Yancey	6							1							1		
Totals	626		6	46	1	27	231	137	110	4	117	48	15	24	179	34	6

STATEMENT D—Continued

Counties	Forcible Trespass	Forgery	Fornication and Adultery	Gambling or Lottery	Health Laws	House Breaking	House Burning	Invest	Injury to Property	Intoxicating Liquors	Larceny and Receiving	Libel	License, Practicing Profession Without	License, Doing Business Without	Manslaughter	Military Laws	Municipal Ordinances
Alamance.....		2				3			1	63	27						
Alexander.....	2									28	8						
Alleghany.....	5								1	1							
Anson.....		2		2		6				98	23						
Ashe.....		1	4	6		6				32	2				2		
Avery.....	4	3	4					1		20	7						
Beaufort.....	3					3				8	7				2		
Bertie.....		1	2	1		18				31	19				1		
Bladen.....						1				4							
Brunswick.....				1						3	2						
Buncombe.....		12	12	31		24		1	1	296	134				2		
Burke.....	4	12	4	11		11				83	6						
Cabarrus.....	1	3	4	1		5				25	30						
Caldwell.....	4		3			5				49	12				1		
Canden.....			2						1	3	2						
Carters.....										16	1						
Caswell.....						2				7	4						
Catawba.....		1	5	1						88	21				1		
Chatham.....			5	4		4			3	79	20						
Cherokee.....	2								1	11	5						
Chowan.....		3								5							
Clay.....	2	1	2							43	5						
Cleveland.....	4	14	2				1	1		28	41						
Columbus.....		5		8		3		1	1	95	24				2		
Craven.....	1					11				10	5						
Cumberland.....		5	4			12				23	63				4		

STATEMENT D—Continued

Counties	Forcible Trespass	Forgery	Fornication and Adultery	Gambling or Lottery	Health Laws	Housebreaking	House Burning	Incest	Injury to Property	Intoxicating Liquors	Larceny and Receiving	Libel	License, Practicing Profession without	License, Doing Business Without	Manslaughter	Military Laws	Municipal Ordinances
Currituck		1								8	2						
Dare										10	1						
Davidson	3	2	3	7		3		2	1	61	32				2		
Davie			6							18	7						
Duplin	3	6	8	6	3	4				39	34				1		
Durham		22	8	4	1	18			10	78	79		1		3		2
Edgecombe	1	4	2	3		19				24	31				3		
Forsyth	14	7	3	8		81	1		1	158	82			1	3		
Franklin		1				9				24	7						
Gaston	1	4	6	14		10		1	1	207	41			1	4		
Gates						4				22	4						
Graham									1	3	3						
Granville		1				3				34	30			3	3		
Greene						3		1	1	3	16				7		
Guilford	14	18		5		38	1	2		98	101			2			
Halifax	1	6	6	3		6				107	24				1		
Harnett		14	2			1				20	23				1		
Haywood			4	4	2					32	18						
Henderson		2	4	7						33	33						
Hertford		1	6	7						32	17						
Hoke	1	1	7	10		3				7	10						
Hyde																	
Iredell	1					1					1						
Jackson	7	6	1							2	20				4		
Jackson	2	5							1	23	8						
Johnston		3	3							3	21				2		
Jones	1					8				40	2						

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STATEMENT D—Continued

Counties	Forcible Trespass	Forgery	Pornication and Adultery	Gambling or Lottery	Health Laws	Housebreaking	House Burning	Incest	Injury to Property	Intoxicating Liquors	Larceny and Receiving	Label	License, Practicing Profession Without	License, Doing Business Without	Manslaughter	Military Laws	Municipal Ordinances
Vance.....	3	2	2			4	1			30	11				9		1
Wake.....	6	27				75			7	179	112						
Warren.....			3	10		1				11					1		
Washington.....										10	3						
Watauga.....			3							48	2				1		
Wayne.....		1				13				30	19				1		
Wilkes.....		3	19	1		8	1		5	140	20		1				
Wilson.....			6	4		18		1		103	79						1
Yadkin.....		11	2				3	2	4	29	19						
Yancey.....			2	10				1		19	11			1	1		
Totals.....	129	282	247	257	10	725	11	22	66	4,927	2,208		10	16	105		8

STATEMENT D—Continued

Counties	Murder— First Degree	Murder— Second Degree	Nuisance	Obstructing Public Highway	Obstructing River	Official Misconduct	Perjury	Rape	Resisting Officer	Riot	Robbery	School Laws	Seduction	Slander	Trespass	Miscellaneous	Totals as to Counties
Alamance.....		2											3		4	8	199
Alexander.....																5	61
Alleghany.....			1						1						1	22	1
Anson.....		2	5						3	13	1					9	234
Ashe.....			1						1						1	3	78
Avery.....													2		2	1	65
Beaufort.....		1														2	37
Bertie.....		4					5		1							3	157
Bladen.....		1							2		5		1				20
Brunswick.....		1														18	33
Buncombe.....		8						1	1	41	4	1	1	1	2	53	825
Burke.....		1							1						3	3	180
Cabarrus.....		2							1				1		1	4	109
Caldwell.....		1															118
Camden.....																2	15
Carteret.....									1							5	42
Caswell.....															4	24	4
Catawba.....		1							2							6	153
Chatham.....		3							2							14	180
Cherokee.....		1	1									2	1			2	39
Chowan.....		1														24	24
Clay.....																	
Cleveland.....		1											1			3	70
Columbus.....		1	4	2			2		1						3	4	121
Craven.....	3	7							5				3			53	278
Cumberland.....		1	1								2				1	1	60
												1	1		6	16	182

STATEMENT D—Continued

Counties	Murder— First Degree	Murder— Second Degree	Nuisance	Obstructing Public Highway	Obstructing River	Official Misconduct	Perjury	Rape	Resisting Officer	Riot	Robbery	School Laws	Seduction	Slander	Trespass	Miscellaneous	Totals as to Counties	
Currituck		2	1														33	
Dare				1		1											26	
Davidson		5							2				5	1		10	189	
Davie		3														1	51	
Duplin		2	2												2	11	225	
Durham		3	6								4	1	1	2	1	43	414	
Edgecombe		3									1		1	1		16	167	
Forsyth	1		3				2	1	4		4		1			33	481	
Franklin		1	3										2			3	69	
Gaston		6						1	1		1		3	3	5	30	476	
Gates		2		1												5	56	
Graham																5	21	
Granville		1	3				1	1					1		1	9	136	
Greene									1							52		
Guilford	1	3							3		7		2		1	27	398	
Halifax		2							6		1		1		1	9	272	
Harnett							1				2		1			4	108	
Haywood		4					3				1			2	1	7	108	
Henderson		4							4				1	1	1	9	195	
Hertford		1					1		2				1	1	1	4	133	
Hoke		1									2					4	30	
Hyde																	2	35
Iredell							1										3	57
Jackson		1													1		4	64
Johnston		1													2	4	10	86
Jones									1				1			5	67	

[illegible]

STATEMENT D—Continued

Counties	Murder—		Nuisance	Obstructing Public Highway	Obstructing River	Official Misconduct	Perjury	Rape	Resisting Officer	Riot	Robbery	School Laws	Seduction	Slander	Trespass	Miscellaneous	Total as to Counties
	First Degree	Murder— Second Degree															
Tyrrell.....									1			1	1			1	104
Union.....		10														6	56
Vance.....		1									2	1	1			11	107
Wake.....		6						1	5		4		2		2	42	677
Warren.....		2							1							11	64
Washington.....			1										1				20
Watauga.....		1						1	3							7	84
Wayne.....		5										1				8	104
Wilkes.....		4					6	1	3				5		1	15	378
Wilson.....		9							1		7	1			1	42	362
Yadkin.....															1	1	76
Yancey.....		1											1			4	87
Totals.....	8	207	71	5	2	8	31	14	100	54	96	12	71	18	96	1,071	15,153

STATEMENT E

	From July 1, 1924 to July 1, 1925		From July 1, 1925 to July 1, 1926	
Number of criminal actions disposed of.....		14,706		15,153
Males.....	13,791		14,319	
Females.....	910		823	
Corporations.....	5		11	
Totals.....		14,706		15,153
White.....	8,494		9,213	
Colored.....	6,122		5,859	
Indians.....	85		70	
Corporations.....	5		11	
Totals.....		14,706		15,153
Convictions, including submissions.....	10,545		10,231	
Acquitted.....	1,471		1,623	
Nolle pros.....	2,609		3,180	
Otherwise disposed of.....	81		119	
Totals.....		14,706		15,153
Murder—first degree.....	15		8	
Murder—second degree.....	239		207	
Manslaughter.....	84		105	
Rape.....	15		14	
Assault with intent to rape.....	78		59	
Arson.....	15		16	
Burglary—first degree.....				
Burglary—second degree.....	50		46	
Forgery.....	309		282	
Larceny.....	1,945		2,208	
Intoxicating liquors.....	4,480		4,927	
Other crimes and misdemeanors.....	7,476		7,281	
Totals.....		14,706		15,153

STATEMENT F

ALPHABETICAL LIST OF CRIMES

Name of Offense	From July 1, 1924 to July 1, 1925	From July 1, 1925 to July 1, 1926
Abandonment.....	174	206
Abduction.....	25	46
Abortion.....	9	4
Affray.....	209	214
Arson.....	15	16
Assault and battery.....	618	669
Assault with deadly weapons.....	1,292	1,332
Assault with intent to rape.....	78	59
Attempt to burn dwellings.....		
Attempt to poison.....	1	
Bastardy.....	3	2
Bigamy.....	62	41
Bribery.....	10	5
Buggery.....		2
Burglary—first degree.....		
Burglary—second degree.....	50	46
Burning other than arson.....	5	13
Carrying concealed weapons.....	749	626
Compounding felony.....		
Concealing birth of child.....	12	6
Conspiracy.....	16	46
Counterfeiting.....		1
Cruelty to animals.....	29	27
Disorderly house.....	334	231
Disposing mortgaged property.....	112	137
Disturbing meetings.....	111	110
Election laws.....		4
Embezzlement.....	97	117
Escape.....	100	48
Failure to list taxes.....	5	15
Failure to work public road.....	34	24
False pretense.....	169	179
Fish and game laws.....	20	34
Food and drug laws.....	9	6
Forceful trespass.....	158	129
Forgery.....	309	282
Fornication and adultery.....	231	247
Gambling or lottery.....	415	257
Health laws.....	3	10
Housebreaking.....	618	725
House burning.....	18	11
Incest.....	18	22
Injury to property.....	95	66
Intoxicating liquors.....	4,480	4,927
Larceny and receiving.....	1,945	2,208
Libel.....	1	
License, practicing profession without.....	8	10
License, doing business without.....	12	16
Manslaughter.....	84	105
Military laws.....		
Municipal ordinances.....	21	8
Murder—first degree.....	15	8
Murder—second degree.....	239	207
Nuisance.....	68	71
Obstructing public highway.....	8	5
Obstructing river.....		2

STATEMENT F—Continued

Name of Offense	From July 1, 1924 to July 1, 1925	From July 1, 1925 to July 1, 1926
Official misconduct.....	6	8
Perjury.....	27	31
Rape.....	15	14
Resisting officer.....	108	100
Riot.....	7	54
Robbery.....	97	96
School laws.....	7	12
Seduction.....	66	71
Slander.....	29	18
Trespass.....	88	96
Miscellaneous.....	1,162	1,071
Totals.....	14,706	15,153

Fees Transmitted by Attorney General to State Treasurer from August Term, 1924, Through February Term, 1926

1	State v. Jones.....	\$ 13.30
49	State v. Dickerson.....	14.40
50	State v. Pressley.....	14.40
83	State v. Farmer.....	10.00
87	State v. Elias Rabil.....	10.00
148	State v. Godette.....	14.40
241	State v. Hartsfield.....	13.30
254	Lacy v. Globe Indemnity Co.....	11.00
273	State v. Galloway, et al.....	23.20
274	State v. Lutterloh.....	14.40
324	State v. Durham.....	12.20
326	State v. Burke.....	12.20
328	State v. Rose.....	12.20
347	State v. Johnston.....	13.30
349	State v. Edwards.....	13.30
328b	State v. Beavers.....	15.50
417	State v. Hammond.....	15.50
419	State v. Knight.....	13.30
421	State v. Holder.....	23.30
449	State v. Mitchem.....	14.40
84	State v. Judd.....	12.20
350	State v. George.....	17.70
481	State v. Weddington.....	12.20
482	State v. Hilton.....	12.20
270	State and City Bank and Trust Company v. Doughton.....	7.70
582	State v. Roberts.....	14.40
88a	State v. McLamb.....	12.20
348	State v. Roberts, et al.....	24.40
50	State v. Denson, et al.....	25.50
116	Young v. Highway Commission.....	12.10
147	State v. Dove.....	13.30
209	State v. Hughes and Best.....	25.50
210	State v. McAfee.....	12.20
241	State v. Clifton Dickerson.....	13.30
242	State v. Sinodis.....	14.40
273	State v. C. W. and Elmer Stewart.....	26.60
274	State v. T. E. Cooper.....	23.20
275	State v. Malpass.....	16.60
322	State v. Barbee.....	12.20
321	State v. Bradsher.....	15.50
345	State v. Jarrett.....	13.30
---	State v. Rufus Self.....	10.00
377	State v. Palmore.....	18.80
449	State and City of Charlotte v. Stowe.....	13.30
521	State v. Miller.....	12.20
547	State v. Marion Ray.....	12.20
3	State v. William and Oscar Horton.....	24.50
4	State v. Baker, et al.....	20.00
43	State v. Sauls.....	16.00
42	State v. Flood.....	11.50
44	State v. Griffin.....	13.00
345	State v. Albert Royall.....	10.00
82	State v. Carivey.....	13.00
93	In re: Inheritance Tax v. Estates of Burwell and Davis.....	6.00
147	State v. Claude and James Willie.....	27.50
209	State v. Strickland.....	14.50
241	State v. Richardson.....	14.50
242	State v. Jackson.....	14.50
322	State v. Thompson.....	14.50
346	State v. Neal.....	14.50

Fees Transmitted—Continued

378	State v. Brodie.....	\$ 19.00
483	State v. Trott.....	23.50
484	State v. Sigman.....	13.00
486	State v. Abernethy.....	13.00
487	State v. Moore.....	13.00
3	State v. Hartsell and Howard	30.50
4	State v. Nathan Dail	14.50
5	State v. Nathan Dail	13.00
6	State v. Walter Dail	16.00
139	State v. Jones.....	10.00
140	State v. J. L. Horne	13.00
209	State v. Whaley.....	16.00
210	State v. Brown.....	17.50
241	State v. Luquire	14.50
273	State v. Maulsby.....	14.50
7	State v. Buck.....	13.00
8a	State v. Adams	13.00
346	State v. Fred Jones	19.00
348	State v. Lakey and wife.....	13.00
521	State v. Hensley.....	14.50
522	State v. Wooten.....	16.00
548	State v. Herman Banks.....	17.50
549	State v. Lillie Jackson.....	10.00
571	State v. Melvin Messer.....	16.00
Totals.....		\$ 1,273.80

OPINIONS TO THE GOVERNOR

PARDON—CONVICTION

December 31, 1924.

It seems that W. R. Walker submitted to a verdict of guilty under a charge of misdemeanor in the Guilford County Superior Court. Judgment was entered against him by the presiding judge, directing his imprisonment in the common jail of Guilford County for twenty days. Appendant to this judgment was an order that *capias* was to issue only upon direction of the court.

Application has been made to you for the pardon of Walker. Upon this you inquire whether you have authority to pardon in such a case if you should determine to exercise that power. Section 6 of Article 3 of the Constitution confers power upon you to grant reprieves, commutations and pardons *after* conviction. There has been some discussion in the decisions of the North Carolina Supreme Court as to whether or not the term "conviction" as thus used includes not only a verdict of a jury but also the judgment of the court. In arriving at a conclusion in this case, however, it is not necessary for us to enter into that discussion, because it is plain that there was both a verdict of guilty, or what was its equivalent, submission, and a judgment in this case. The judgment here, then, was not suspended, but its execution was delayed. It was a direct judgment sentencing Walker to jail for twenty days, with the execution of the judgment delayed until further orders of the court.

In North Carolina the time at which a sentence shall be carried into execution forms no part of the judgment of the court. So, we have here a complete judgment, with its execution delayed, and consequently, we think you have authority under the Constitution to pardon this man if you should determine it to be such a case that pardon should issue. The North Carolina authorities in point are *State v. Cockerham*, 24 N. C., 204; *State v. McClure*, 61 N. C., 491; *State v. Cardwell*, 95 N. C., 643; *State v. Yates*, 183 N. C., 753, and *State v. Vickers*, 184 N. C., 676.

EXTRADITION—FUGITIVE FROM JUSTICE

January 29, 1925.

In the matter of the extradition from Kentucky of S. L. Williams

As Mr. Richardson, the former Private Secretary, had consulted me over the 'phone in regard to this matter previously, the Attorney General has turned it over to me for reply.

At this former conversation with Mr. Richardson, my understanding was that there was an attempt to bring Williams back from Kentucky under the original extradition proceedings after he had been brought back to North

Carolina and had been tried and sentence passed upon him. What I told Mr. Richardson amounted only to this: That there must be some new crime or some new cause for extradition before Williams could be extradited a second time. I did not see the papers in the case at that time. After examining the papers, it is quite clear that there are two ways by which Williams can be extradited from Kentucky:

First. It is quite clear that an indicted or convicted prisoner who escapes may be a fugitive from justice. It is no less clear that one convicted of a crime who has been paroled and violates said parole by escape to another state may be extradited therefrom. But the demand for extradition must be based upon an adequate showing of these facts. It appears from the papers that when Williams was brought back under the former extradition, he plead guilty to the charge of abandonment in the Mecklenburg County Superior Court. The judgment was that he be confined in the common jail of Mecklenburg County for a period of two years, to be assigned to work on the public roads of said county, *capias* not to issue so long as he observed the following conditions: "First, that he pay the costs of this action, including the fees for extradition expenses; second, that he live with his wife and family continuously hereafter; third, that he care for and support them in a husband-like manner; fourth, that he give a good bond in the sum of \$1,000 to make his personal appearance at each May term of this court for a period of five years, and show the court at each time that he has complied with the conditions upon which this sentence is arrested." It seems that Williams had violated the conditions of this judgment and returned to Kentucky, and there is some demand for his second extradition. Upon a proper showing of these facts, it is clear that the Governor of North Carolina may demand this extradition under the principles above set out. See *In re Wm. H. Hughes*, 61 N. C., 58.

Second. It appears that Williams not only abandoned his wife and failed to support her, but also a minor child. This was the basis of the original charge. In addition, however, to this abandonment, there was a second abandonment, apparently after the judgment of the court above set out was entered. In other words, this second abandonment was a new crime for which he could be extradited if proper papers are presented to the Governor of North Carolina. *State v. Davis*, 79 N. C., 603; *State v. Hannan*, 168 N. C., 215; *State v. Beam*, 181 N. C., 597.

Again, the Supreme Court has held, *State v. Bell*, 184 N. C. 701:

Within the intent and meaning of C. S. 4447, the willful abandonment by a father of his children of the marriage is made a separate offense of like degree with that of his willful abandonment of his wife; and his duty to the children is not lessened by the fact that a decree of absolute divorcement has been obtained, the obligation to support his own children continuing after the marriage relation between him and his wife has been severed by the law.

In the light of this decision, then, it makes no difference whether the divorce obtained by Williams in Kentucky on July 17, 1924, was valid or not.

We are, therefore, clearly of the opinion that the Governor of North Carolina may, upon a proper showing, demand the extradition of Williams again, first, because he is a fugitive from justice in avoidance of valid sentence of the court; and second, because he has committed a new crime since his former extradition and has fled from the State's jurisdiction after the commission of that crime.

RAILROAD POLICE

February 6, 1925.

You inquire if commissions issued by Governor Morrison to railway policemen under the provisions of C. S., 3484 to 3488 expired with the end of his term of office, and if Governor McLean should issue new commissions to those officers as a consequence. My reply is that the commissions so issued by preceding Governors do not terminate with their terms of office but continue in force unless and until terminated in some other way. These commissions issued by preceding Governors are still in force and will so continue until otherwise terminated.

You further inquire if the Governor has power to terminate these commissions at will. My reply is that he does have such power. Under the sections of the statutes referred to, the duration of these appointments is not prescribed. It is the universal rule that where the duration of the office is not prescribed by the law creating it or providing for the appointment of the incumbent, the power to remove is an incident of the power to appoint. The law provides that the company upon whose request the appointment is made may file a notice that it no longer requires the services of any policeman so appointed and thereupon the powers of such officers shall cease and determine. This does not mean that these officers are appointed simply at the will and pleasure of the particular companies as named in C. S. 3484. Necessarily, the legislative body had in mind in passing this act that the power to remove such policemen would be an incident of the power to appoint and, therefore, did not specifically set out that the Governor might terminate these commissions at his will. I, therefore, advise you that the Governor may recall the commissions issued to the policemen so appointed by him under the provisions of the above mentioned sections of the Consolidated Statutes.

You also inquire if the Governor may make these appointments for a definite period, such as two years. In my opinion he may do so, subject, of course, to the provisions of the statute allowing the companies for which they are appointed to file a notice to terminate the services of these officers, as set out in C. S. 3488, and also subject to the power of the Governor to revoke the commissions so issued for a period of two years when in his judgment such action should be taken.

EXTRADITION—FUGITIVE FROM JUSTICE

February 13, 1925.

In the matter of the extradition of Chas. L. Fake

It appears that Chas. L. Fake, whose extradition is demanded by the State of New York under a charge of desertion of his two minor children, has been a resident of the State of North Carolina since 1918. Previous to his coming to the State of North Carolina he married in the State of New York on November 8, 1910, and had by his wife two children. His wife refused to live with him in North Carolina and he obtained a divorce in the State of North Carolina in February, 1921, from the bonds of matrimony.

In July, 1922, Fake visited his relations in New York and while there was arrested under a charge of desertion of his minor children. He gave bond and returned home immediately. Through the intervention of the district attorney in whose court the bill of indictment had been found against him he was allowed to settle the matter without returning to the State of New York, by paying his wife, who then lived in New York, the sum of \$500, and to the St. Joseph's Infant Home, which had the custody of his minor children, a like sum of \$500. Thereupon, all proceedings under the bill of indictment were stopped and he was released from further liability for the support of those children, his wife in the agreement assuming the future support of those children.

It is manifest from this recital that Mr. Fake has not been back to the State of New York since his arrest, but that the whole proceedings were quashed and the matter was settled without his return to that State. The indictment upon which the State of New York demands the extradition of Mr. Fake was found on October 29, 1924, and charges the desertion and non-support of his minor children, which is a felony under the laws of the State of New York. Since Fake's return from the State of New York in July, 1922, he has not been in the State of New York. The general rule as laid down by the United States Supreme Court in quite a number of cases is, among other things, that the governor of the state from whom the alleged fugitive is demanded may determine in the first instance whether or not the alleged fugitive so demanded is in reality a fugitive from justice within the meaning of the Federal Constitution and of the Act of Congress enacted in pursuance thereof. We think it very clear that under the circumstances here recited, Mr. Fake is not a fugitive from justice of the State of New York and consequently, you may refuse the demand upon you for his extradition by that State.

NORTH CAROLINA RAILROAD—PRINCIPAL OFFICE

February 16, 1925.

Your letter of February 10th, enclosing a letter of Mr. Alexander Webb to the Governor, dated February 7th, was referred by the Attorney General to me for investigation. I have investigated the matter as fully as I could in the crowded condition of work in this office and have come to the conclu-

sion that there is nothing in the charter of the North Carolina Railroad Company which provides that the company's principal office shall be at Burlington, N. C. Indeed, the by-laws of that company, in section 3 of the chapter headed "Directors," is in the following form:

The board of directors shall meet at least once in two months at Burlington, or at such other place as they may direct, which meetings shall take place on the third Fridays of August, October, December, February, April and June, in each year, and the president shall be at liberty to convene the board as much oftener as the interest of the company may require.

This indicates, of course, that these directors may meet at any other place than Burlington at their discretion. Section 1 of the by-laws declares:

The general annual meeting of the stockholders shall be held alternately at Greensboro, Raleigh, Salisbury and Hillsboro on the second Thursday of July in each and every year until otherwise ordered.

There is nothing in these by-laws, a copy of which is before me, which fixes Burlington as the principal place of business of the corporation though for convenience no doubt that has been for years the place where offices were kept. They were originally located at Burlington because there was established the shops of the company. So unless Mr. Webb knows of some specific provision requiring the company's principal office to be maintained at Burlington, which we have been unable to find, there is no requirement that it should be maintained at that particular place and it will not be necessary to amend the charter to permit the directors to remove the office to some other point.

It would be necessary under the law as it is written now, C. S. Section 6547, to obtain the permission of the Board of Internal Improvements for the sale of the office building of the company now located in the city of Burlington, as it is said that a bill is now pending before the General Assembly which repeals the chapter of the Consolidated Statutes which establishes the Board of Internal Improvements (Chapter 107), it would be necessary, if the General Assembly legislates upon the point, to obtain the consent of the body or board which the Legislature substitutes in the place of the Board of Internal Improvements, to the sale. Out of an abundance of caution, however, in drafting the bill which imposes this duty upon some other board or commission, it might be well to include therein authority to the board of directors to change the company's principal office from Burlington, N. C., to some other point on the railroad more convenient for the transaction of business, at their discretion. To that end we herewith enclose a bill which deals with these particular points only.

DIRECTORATES—APPOINTMENT—VACANCIES

February 21, 1925.

In the matter of appointments to fill vacancies on the various boards, etc.

In accordance with your request, I have investigated your authority to make appointments and the limitation upon that authority contained in some of the statutes that the appointment is to be made by and with the advice and consent of the Senate. The following boards and institutions, so far as I have been able to investigate, have the vacancies in them filled by the Governor, by and with the consent of the Senate:

The Board of Agriculture.
The State School for the Blind.
Caswell Training School.
The State Sanatorium.
The State Hospital, Raleigh.
The State Hospital, Morganton.
The State Hospital, Goldsboro.
The Highway Commission.
The Geological Board.
The Fisheries Commission.

This, of course does not take into account any board created by the present Legislature. It appears that there are not any existing vacancies in any of the boards or institutions set out above. According to the list furnished this office by Miss Turner of your office, the first vacancy occurs in the Board of Agriculture, and that is on March 11, 1925. It is not at all probable that the General Assembly will be in session at that time. The rule in regard to filling vacancies where the original appointment is made by the Governor, by and with the consent of the Senate, is thus defined in *Salisbury v. Croom*, 167 N. C., 223:

The Governor alone under the general power to fill vacancies conferred by sub-section 3 of section 7636 of the Consolidated Statutes, may make appointment (to vacancies), when the Senate is not in session, such action could only be for the interval until the Senate meets and the two agencies specially provided by law, to wit: the Governor and the Senate, shall concur in such appointment.

Wherever, then, a vacancy occurs in the directorate of any institution or any board after the adjournment of the Legislature, it makes no difference how soon after such adjournment, you fill the vacancy by your appointment *ad interim*, and report the same for confirmation to the Senate of the General Assembly of 1927. If any vacancy should occur during the session of 1925, the law contemplates that you shall send your appointment to the existing Senate for confirmation.

EXTRADITION—FUGITIVE FROM JUSTICE

March 3, 1925.

In the matter of the extradition of William H. Carter

This was a demand by the Governor of Virginia for the extradition of W. H. Carter under a charge of willful desertion and non-support of his wife and children. It seems that Carter and his wife were living at Newport News in the State of Virginia until the latter part of August, 1924. At that time he left Newport News and came to Windsor, North Carolina. His purpose in coming to North Carolina was to better his condition and he came with the consent of his wife. There is no conflict between the affidavit of Josephine Carter, his wife, and his own affidavit. According to the affidavit of W. H. Carter and that of his father, Austin Carter, the former in moving to North Carolina did better his condition, as they state that he was unable to make a living in Newport News. He swears that he has at all times been ready, willing and able to provide for his wife and children in Bertie County, North Carolina, and has so advised her, but she has at all times refused to come to North Carolina and demands that he support her in Newport News, Virginia.

In his affidavit he files also an itemized statement, to which he makes oath, which, if believed, shows that he sent his wife \$20 in September, 1924; \$15 in November, 1924; \$30 in December, 1924; \$20 in January, 1925, and also sent her by his sister, Ella Fields, \$27 in January, 1925. The latter statement is corroborated by the affidavit of Ella Fields incorporated in the evidence of W. H. Carter. Mrs. Carter herself swears that he has sent her since the separation only \$15. She declares also in her affidavit that she has at all times since his departure been willing, and is now willing, to come to North Carolina to join him, providing he will send the necessary funds with which to secure clothing and transportation.

Upon the two latter points there is this conflict, then, between the evidence of the wife and the evidence of the husband. They agree, however, upon the essential fact, that he left Virginia to better his condition and left his wife with her consent. They further agree that they are both willing to come together in North Carolina if Carter will send the money to his wife for transportation expenses. No doubt Carter left Virginia with the intent to send for his wife and bring her to the State of North Carolina and there support her.

If this is true, he at no time committed a crime in Virginia and he did not even begin to commit a crime in that State. The North Carolina Supreme Court in *In re Sultan*, 115 N. C., 57, has held that departure from the jurisdiction after the commission of the act, in furtherance of a crime subsequently consummated, is a flight from justice within the meaning of the law. There, a man procured by false representations goods to be shipped to him in this State from Pennsylvania. After making the false representations, but before the goods were shipped, he returned to North Carolina. The Court held that he was a fugitive from justice. The distinction between that case and this is manifest. The crime in the sense of a willful and un-

lawful act had been begun in the State of Pennsylvania. In this case no crime had been begun in the State of Virginia. If any crime was committed, it was committed in North Carolina subsequent to his return to this State.

The Supreme Court in *State v. Hall*, 115 N. C., 811, holds that there can be no constructive presence in another state where a crime is alleged to have been committed. This case is annotated in 28 L. R. A., 289, where it is declared.

The American cases are unanimous in holding that a person cannot be a fugitive from justice unless he was in the demanding state when the crime was committed.

For these reasons we think that you would be authorized to refuse the extradition of Carter under the circumstances above stated.

There is a point, however, if you will permit us to suggest it, at which all of the difficulties of this husband and wife may be settled. He states that he is not only willing but anxious to send transportation money to his wife to join him in Bertie County, North Carolina. She states in her affidavit that she is willing to come to North Carolina to be with him if he will send sufficient money for that purpose. If, therefore, Carter will show by his deed in this regard that he is honest in his assertion, there ought to be no difficulty in bringing this husband and wife together, notwithstanding the extradition proceedings.

In 32 A. L. A. the subject of the extraditable quality of the act of a husband who abandons and fails to support his wife and children located in another state is fully discussed, particularly in the note at page 1167. The case annotated was decided by the New York Court of Appeals April 1, 1924. This case and the note thereto sustain the position advanced in this opinion.

CHECKS—INSOLVENT BANKS

March 19, 1925.

It seems from the letter of Honorable W. N. Everett, Secretary of State, to you and the Council of State that he had on deposit in the United Commercial Bank at Plymouth, N. C., \$53.50, State funds, deposited during the month of December, 1924, and \$74.50 of deposits of State money for the month of January, 1925. He had also on deposit in the Martin Savings Bank and Trust Company at Williamston, N. C., \$57.50 of State money. He checked upon both of the deposits in the United Commercial Bank at Plymouth, check being payable to B. R. Lacy, State Treasurer. These checks were transmitted to the Plymouth bank in due course of business and were not paid because the bank had become insolvent. The Martin Savings Bank and Trust Company also became insolvent before the amount deposited there, \$57.50, had been withdrawn. Mr. Everett does not state in his letter how nor why these amounts were deposited in local banks. We suppose, however, that one of his agents in the collection of license taxes of some sort

had collected these amounts and had deposited them in these banks, subject to his check.

It is, of course, unfortunate. It is quite clear, however, that these amounts should not be carried in the bad check file. That is intended to care for conditions arising from the giving by individuals of bad checks to that Department, and not from those arising out of the insolvency of a particular bank in which a deposit is placed. No doubt there is enough in the circumstances to appeal to the General Assembly for a refund. In the meantime, however, we know nothing that can be done in accordance with law except that Mr. Everett should make good these deposits and recover from these banks any dividend upon the amount in his own exoneration and later appeal to the sense of justice of the General Assembly to reimburse him for his actual loss.

STATE SEAL TAX—DATE OPERATIVE

March 20, 1925.

In reply to your inquiry in regard to effective date of section 91, Revenue Act, 1925, with respect to increased seal tax on commissions therein provided for, I have to say that this increase becomes operative June 1, 1925. Therefore, up to and including May 31, 1925, you should charge only \$2.00 for the seal on commissions and thereafter the fee will be \$2.50.

CAPITAL CONVICTION—ACT OF 1925—REPRIEVE

March 25, 1925.

At the recent session of the General Assembly it, by an act ratified February 24, 1925, provided a substitute for Section 4663 of the Consolidated Statutes. Stated broadly, that substitute provides that where an appeal is taken by a defendant, convicted of a capital crime, to the Supreme Court of North Carolina and that Court finds that there was no error in the trial, such convict is to be executed in the manner provided in the article dealing with capital execution upon the third Friday after the filing of the opinion affirming the judgment of the court below. It is made the duty of the Clerk of the Supreme Court to notify the warden of the Penitentiary of the date of the filing of the opinion, and thereupon the condemned person is to be executed on said third Friday after the date of the filing of the opinion affirming the judgment.

A man named Evans appealed from a capital conviction to the Supreme Court and the opinion of the Court affirming the judgment upon his conviction was filed on March 4th. The substitute for Section 4663 was not brought to the attention of the Clerk of the Supreme court until this morning, when he was furnished a copy of that substitute. He, therefore, did not obey the statute in the particulars hereinbefore set out. If he had had knowledge of the statute and had obeyed it, the execution of Evans would

have occurred on Friday, March 20th, which was the third Friday after the filing of the opinion of the Court, March 4th.

You inquire whether or not you have authority under the Constitution and laws of North Carolina to grant the prisoner a reprieve for a certain length of time, to be determined by yourself, such reprieve to commence at a time anterior to March 20th. The statute further provides that when there is such reprieve, the prisoner is to be executed upon the third Friday after the termination of such reprieve and declares that it shall be the duty of the Governor to give notice to the warden of the State Penitentiary of the date of the expiration of such reprieve.

The time when punishment is carried into execution under the decisions of the Supreme Court of this State forms no part of the judgment. Here, then, is a man sentenced to death in the Penitentiary under a proper judgment without, however, the time for his execution having been definitely fixed. It seems quite clear that under these conditions your Excellency may reprieve this man, and if you do not care to make the reprieve retroactive to March 19th, you may let it commence at any time that you may so order, with his execution to follow on the third Friday after the expiration of such reprieve.

BUDGET BUREAU—PAY OF EMPLOYEES

March 27, 1925.

The budget act makes the Governor of the State ex officio director of the budget. Section 20 of that act is as follows:

The Director is hereby authorized to secure such special help, expert accountants, draftsmen, and clerical help as he may deem necessary to carry out his duties under this act, and shall fix the compensation of all persons employed under this act, which shall be paid by the State Treasurer upon the warrant of the State Auditor. A statement in detail of all persons employed, time employed, compensation paid, and itemized statement of all other expenditures made under the terms of this act shall be reported to the General Assembly by the Director, and all payments made under this act shall be charged against and paid out of the emergency contingent fund when such fund is provided in the general appropriation bill.

Upon this you ask the opinion of this office as to from what funds the special help provided for in the above section are to be compensated. We find upon examination that section 3861(d), 3d Volume C. S., p. 260, authorizes the Governor and Council of State to employ any additional clerical or stenographic help in any of the Departments of the State upon written request of the head of such Department. Unfortunately, however, the amount of salary which may be fixed under this section is limited by its terms to \$1,800 per annum. This is wholly inadequate to provide the director of the budget with the help specified in section 20 of the act. The concluding clause in section 20 declares that all payments made under this act shall be charged against and paid out of the emergency contingent fund *when such*

fund is provided in the general appropriation act. That fund was provided in the appropriation act of 1925. It is not, however, available until the end of the present fiscal year, to wit: on July 1, 1925. This is apparent from section 1 of the appropriation act.

The Legislature, however, could not have intended to leave the director of the budget in this helpless condition for lack of efficient help. It must have known that any appropriation made in the appropriation act of 1925 would not, and could not, be available until the end of the present fiscal year. When that is available, then the expenses of the director of the budget as stated in section 20 may be charged against and paid out of the particular fund provided for that purpose. Meantime, however, the General Assembly could not have intended that this minute and particular act should be ineffective from lack of appropriation. It, therefore, directed that the compensation of all persons employed under this act should be paid by the State Treasurer upon the warrant of the State Auditor. This, then, can be effective as a charge against the general funds of the State until the special fund out of which it is to be payable becomes available. It requires it to be paid out of the special fund only when it is provided in the general appropriation bill. It is not provided in the general appropriation bill until the 1st of July, 1925.

Consequently, we advise that the procedure set out in section 20 be followed in regard to the employment and compensation of the special help for the director, and such amounts to be paid out of the general fund of the Treasury until the special fund becomes available.

NOTARIES—POWERS

March 31, 1925.

In re Appointment of B. Stark, Jr. as Notary Public

It seems that Mr. Stark was commissioned as a notary public on February 19, 1925. His application came up from Sampson County and the commission was issued to him in Sampson County. If he qualified before the Clerk of the Superior Court of Sampson County, and the procedure set out in Section 3173, C. S., was complied with, then there is no difficulty at all about his authority to act as notary public though at the time of his qualification in Sampson County his permanent residence was in Richmond County.

Before the act of 1891, which is brought forward in C. S. as Section 3176, the official acts of notaries were probably confined to the county in which they qualified. Since that act, however, it is entirely clear that they may perform the functions of their office during the term for which they are appointed in any county in North Carolina in which they happen to be at the time they exercise those functions—provided, of course their actions are authenticated by their seals.

The act of 1891, Chapter 248, is as follows:

That the power of all persons who are at present notaries public or who may hereafter be appointed such shall not be limited to any single county or specified portion of the State, but the said notaries public shall have full power and authority to perform the functions of their office in any and all counties of the State and that full faith and credit shall be given to any of their official acts wheresoever the same shall be made and done.

Consequently, Mr. Spark, if he complied with Section 3173, is qualified to act as a notary anywhere in the State of North Carolina, and not simply in Sampson County.

COURTS—SPECIAL TERMS

April 2, 1925.

I have received your letter of April 2d, enclosing one from Judge F. A. Daniels to Governor McLean in regard to the calling of a special criminal term for Wake County. This office has uniformly held that a regular term of the courts of a district cannot be displaced by a special term. C. S. Section 1450 gives the Governor authority to call a special term, but declares that such special term "is not to interfere with any of the regular terms of the courts of his district." This was held in an opinion of this office dated November 14, 1917, to former Governor Bickett. See biennial report of the Attorney General, 1916-1918, page 7. Opinion of the Attorney General, September 12, 1921, to Judge John H. Kerr.

It is true that if the Governor disregards this restriction and calls a special term to be held during the week of a regular term, there is no way by which the courts can hold his action invalid. *State v. Lewis*, 107 N. C., 967; *State v. Hall*, 142 N. C., 710. If, however, there is any way by which a criminal term can be held in the county of Wake while the civil term continues and is concurrent with the special criminal term so called, then under Chapter 100, Public Laws, Extra Session, 1924, the Governor may call this special term, appoint a special judge to hold it, and both terms can be held at one and the same time.

We are not informed as to whether this is the condition in Wake County. A special term was called in Guilford County under this late act.

GOVERNOR—STATE AUTOMOBILE—TORTS

April 3, 1925.

Memorandum No. 16—In re Insurance on Mansion Automobile

In your letter of April 2d you request answers from this office to the following questions:

(1) What, if any, liability attaches to the State for damage to persons or property from the Mansion automobile when operated by the chauffeur who is employed by the State?

The State under no conditions is liable for damages occasioned by the default or neglect of one of its officials or employees, consequently, the answer to this question is, "None."

(2) What, if any, liability applies to the Governor for damage to persons or property by the Mansion automobile when operated by chauffeur employed by the State?

As the question is framed, its answer should also be "None." This, however, might be misleading. If the Governor is riding in the automobile at the time and does not exercise proper control over the chauffeur so that any illegal or negligent act of the chauffeur is not prevented, if the circumstances should be such as reasonably to require the interference of the Governor, or is committed either tacitly or directly with his consent, then under the usual rule it seems that the Governor might be personally liable for damages inflicted in consequence of such default or neglect. This liability could arise only, however, when the Governor himself personally had failed to use the proper care which is imposed upon all persons in the operation of these machines upon the highway where conditions may arise that would create danger to the life, limb or property of others. The liability would arise from the application of the maxim, "So use your own as not to injure your neighbor"; if there is personal neglect.

STONEWALL JACKSON TRAINING SCHOOL—TRUSTEES

April 4, 1925.

*In the matter of the appointment of Trustees of Stonewall Jackson
Training School*

So far as we are informed there are four institutions in the State of North Carolina for whose support the State makes biennial appropriations which are not wholly controlled by the State. One is the Oxford Orphan Asylum for whites at Oxford; another is the Orphanage for Colored Children at Oxford, and another is the Slater Normal School at Winston-Salem, and the last is the Stonewall Jackson Training School at Concord.

It seems that certain private persons were instrumental in the establishment of the latter institution at Concord and reserved the right to appoint trustees themselves. This is done by conferring upon the board itself authority to appoint a controlling number of the board of trustees. Of course, the act of 1925, which confers upon the Governor the authority to appoint all the members of this board and to fill vacancies, cannot affect the rights of those who were made by the act of the General Assembly of 1907, or their successors appointed in the way provided by the act, trustees of such institution, if these trustees and their successors occupied a private relation to the institution in such sense as that the act of 1925 would destroy such private right. We, however, do not interpret the situation as conferring upon these trustees and their successors any such private right as would be protected by the Constitution of the State.

The appropriations made by the State for the institution have been gradually increased since 1907 from \$5,000 annually to \$120,000 annually in the

appropriation act of 1923, Chapter 163, P. L. Accompanying the latter annual appropriation, too, was the sum of \$20,000 to pay the debts of the institution. It is quite clear, therefore, we think, that those incorporators who had any private interest in the institution had waived the same by leaving the support of the institution itself so largely to the State. As a consequence, we think that section 2 of the recent act of the General Assembly providing for the appointment of a board of trustees of the Stonewall Jackson Manual Training School, declaring that it should consist of eleven persons and conferring the power of appointment wholly upon the Governor, is constitutional and the Governor can act thereunder as a valid law. Particularly is this true, when the Constitution of 1868 reserves to the State the power to amend all charters, even of private corporations.

STATE INSTITUTIONS—DIRECTORS—GEOGRAPHICAL LIMITATIONS

April 4, 1925.

Referring to the conversation with you over the 'phone this morning, as to any geographical limitation upon your power to appoint directors or trustees of a State institution. We have investigated the statutes and find that the only geographical limitation upon the exercise of this power on your part is with reference to the three hospitals for the insane and the Caswell Training School at Kinston. The statute declares that no two of these appointees shall be residents of the same county. As to all the other appointments, we find no restrictions at all.

STATE INSTITUTIONS—EMPLOYEES—APPOINTMENT

April 4, 1925.

Memorandum No. 18—In re Institutional Appointments

You request this office to examine the charters and other laws governing the following institutions and advise you whether or not the board of directors or the superintendent has control of the employment of business manager, steward and other of the more important employees; and whether or not the duties of the superintendent are so fixed by statute as to prevent the board from electing a business manager to have charge of all the business affairs of the institution, leaving to the superintendent the professional and technical duties of the institution. The names of the institutions inquired about are herein set out, with the answer to the question appended to each one:

Caswell Training School, Kinston. The board of directors has control of the employment of a business manager and other important employees. There is nothing in the statute with reference to this institution to prevent this board from electing a business manager to have charge of all the business affairs of the institution. See C. S. Section 5894.

State Hospital, Goldsboro. The same answer is given here. C. S. Section 6158; 3d Volume, p. 498, Section 6159(b).

Eastern Carolina Teachers College, Greenville. The same answer is given here. C. S., 3d Volume, Sections 5863 et seq. p. 465.

State School for the Deaf and Blind, Raleigh. The same answer as to this institution. C. S. Section 5874.

State Hospital, Morganton. The same answer as to this institution. C. S. Section 6158; 3d Volume, Section 6159 (b).

School for the Deaf, Morganton. C. S. Section 5891, in defining the duties and qualifications of the superintendent, declares that he shall possess good, executive ability and shall be the chief executive officer of the institution. He shall see that the pupils are properly instructed in the branches of learning and industrial pursuits as provided for in this article and under the supervision of the board. The board shall elect all teachers and subordinate officers, by and with the consent and recommendation of the superintendent. This manifestly gives the superintendent the very responsible position of general manager of the institution. We do not interpret the act, however, as preventing the board from electing a business manager with the consent and upon the recommendation of the superintendent, with that business manager to have control only of the distinctively business features of the institution.

Cullowhee Normal School. We think the board of directors has control over the employment of a business manager or steward, and that there is nothing in the statute to prevent its selecting a business manager to have charge of all the business affairs of the institution. C. S. Section 5839.

Appalachian Normal School. The same answer may be given as to this institution. C. S. Section 5855.

Negro Agricultural and Technical College, Greensboro. The same answer may be given as to this institution. C. S. Section 5830.

These answers are based upon the fact that the General Assembly creates the boards of the particular institutions involved, and gives them general authority to manage that institution, and does not, except in the case of the Morganton School for the Deaf, restrict the powers of these various boards. In the absence of such specific restrictions, the power to elect a business manager is necessarily included in the general power to manage the particular institution.

STATE PRISON—FIVE YEAR PROVISION

April 8, 1925.

I have your memorandum of April 7th in which you call my attention to C. S. 7716, and asked for my opinion thereon. The section is as follows:

All persons convicted of crime punishable by imprisonment in the State Prison in any of the courts of this State whose sentence shall be for five years or more shall be sent to the State Prison.

You ask if the penitentiary authorities can refuse to receive prisoners whose terms are for less than five years and whether the judges of the Superior Court may sentence prisoners to confinement in the State's Prison where the imprisonment to be imposed is for a less term than five years.

Felonies are punishable by imprisonment in the State's Prison, and in many instances these terms may be, and are, for less than five years. For instance, the minimum term for murder in the second degree is two years and for manslaughter four months. Where the statute provides that the punishment may be imprisonment in the State's Prison, the judge sentencing the prisoner undoubtedly has the right to send him to the State's Prison. It is equally clear that the penitentiary authorities have no right to refuse to receive a convict so sentenced.

I construe C. S. 7716 not to limit the right of a judge to send a convict to the State's Prison where such punishment is otherwise prescribed in another statute, but to make it obligatory upon him to send such convict to the State's Prison where under the statute he imposes a sentence of five years or more. This section does not undertake to repeal the various statutes providing for imprisonment in the State's Prison. It does not do so directly, and repeals by implication are not favored.

CAPITAL CONVICTION—EXECUTION

April 22, 1925.

Referring to my conversation with Mr. Sink last night, I understand that one of the convicts in the State Prison awaiting execution was reprieved until Friday, April 10th. You desire a ruling from this office whether upon the recent statute the first Friday, April 10th, is to be counted in determining when the execution shall take place. We think it very clear that it is not to be. The expression used in the statute in that regard is as follows:

In case of a reprieve by the Governor, such condemned person, convict or felon shall be executed in the manner heretofore provided by this article upon the third Friday after the expiration or termination of such reprieve.

In the instant case, then, the time automatically fixed for the execution of this person is Friday, May 1st, excluding thus from the computation the Friday on which the reprieve expired.

ELECTION—OPENING OF POLLS

April 23, 1925.

I have considered the letter of Mr. E. S. Waddell to you, dated April 20, 1925, and herewith return it.

The general election law, C. S. Section 5976, requires the polls to be open on the day of election from sunrise until sunset on the same day. This, however, does not apply to municipal elections because they are regulated by article 3 of Chapter 56 of the Consolidated Statutes. Section 2664 requires polls to be open from eight o'clock a.m. until sunset, and no longer. Section 2649 declares what cities and towns the article is applicable to. There are quite a number of exceptions to the act, but Wilmington and New Hanover

County are not among those exceptions. I have examined the amendments to the Wilmington charter since the ratification of the Consolidated Statutes August 1, 1919, and find that this general provision as set out in section 2664 has been in no particular modified.

STATE ANTICIPATION NOTES—INTEREST

May 5, 1925.

*Memorandum No. 26—Interest on notes issued in anticipation of
Highway Bonds*

We have considered carefully the letter of Mr. Masslich to you, a copy of which was enclosed in yours of May 1st. We are in thorough accord with Mr. Masslich's opinion expressed therein in regard to the interest on notes issued in anticipation of Highway bonds. First, however, it is necessary to correct a mistake of fact in Mr. Masslich's letter in regard to my attitude towards this question. The first opinion was written by myself to Price, Waterhouse & Company while engaged in a State audit in the spring of 1923. The second letter, which I showed Mr. Masslich, was written by Attorney General Manning himself, and this modified one of the opinions expressed by me in the previous letter of March 31st. I am sending herewith copy of our biennial report, 1923-24, which has in it these two letters, the first at page 278 and the second at page 281.

In addition to what Mr. Masslich said in his letter to you, I desire to call your attention to the following considerations:

(1) The distinction between a general fund bond issue and a special fund bond issue is to be found in this: The bond issue in the first instance is to provide funds to meet appropriations made for some specific purpose. There the object is to provide money to meet these appropriations. A special fund, however, is one which is created by the issue of bonds of a specific amount, with the whole of the proceeds of the sale of these bonds to be used for the purposes stated in the statute. An illustration of this distinction is to be found in the Public Laws of 1921 in comparing Chapter 165 thereof, which was an act entitled "An act to issue bonds for the permanent improvement of certain State institutions," and the State Highway Commission act, Chapter 2 of the Public Laws of 1921. Chapter 165 directs the issue of bonds for the purpose stated therein. It is entirely clear that this is a bond issue for the general fund of the State and all the expense of issuing the bonds, the premium received upon the bonds and the interest upon notes anticipating them, etc., are either credits to the general fund or charges against the general fund. This is apparent from the fact that the proceeds go into the State Treasury and from these proceeds certain specific sums named in the act are allocated to the various educational and charitable institutions of the State.

(2) When, however, we turn to Chapter 2 of the Laws of 1921—the State Highway act—we find a difference. Fifty million dollars of bonds are to be issued and sold. From the proceeds of these bonds there is no specific appropriation of so much money for a definite purpose. On the contrary, the whole of the proceeds are to be deposited in a particular fund designated

in the act as the State Highway Fund. It is declared at the end of section 40 of the act, referring to the sale of these bonds:

When sold and turned over to the State Treasurer, all of said fund to be part of the construction fund and known as the State Highway Fund.

Again at the end of section 41:

All expenses necessarily incurred in the preparation and sale of the bonds shall be paid from the proceeds of such sale.

Section 45 deals with the issue of notes in anticipation of the sale of the bonds. It is apparent that all the expenses of issuing these notes are to be paid out of the Highway fund and any premium or interest derived from the sale of such notes is to go into the State Highway fund. It is declared in the latter part of said section:

The notes issued in anticipation of the sale of the bonds shall be paid with funds derived from the sale of bonds unless otherwise provided by the General Assembly. The notes issued for the payment of interest shall be paid from the funds collected under this act, as herein provided for, when collected, unless otherwise provided for by the General Assembly.

From this it is apparent, we think, that the General Assembly in its scheme of highway construction was creating a special fund which was to pay its own expenses and take its own profits of all kinds in the sale of the bonds. There was no appropriation by the General Assembly of any portion of the proceeds of the bond issue to the Highway scheme, but the whole bond issue was devoted to that purpose.

STATE BOARD OF PHARMACY

May 7, 1925.

In the matter of Dr. S. S. Peterson of Gastonia

It is not possible from Dr. Peterson's letter to you to discover exactly what he means to do and what he desires you to do. There is a provision of the statute, 3d Volume of C. S. Section 6667, which gives the State Board of Pharmacy authority to grant any legally registered practicing physician a permit to conduct a drug store or pharmacy in a village of not more than 500 inhabitants. This board is further authorized, after due investigation, to grant a permit to a legally registered practicing physician to conduct a drug store or pharmacy in a town of more than 500 and not exceeding 600 inhabitants. Nothing in this section, too, shall be construed to interfere with any legally registered practitioner of medicine in the compounding of his own prescriptions.

It is manifest from this, we think, that the Board of Pharmacy has not transcended its authority in asking the questions which it did of Dr. Peterson.

We return herewith Dr. Peterson's letter and the several communications from Mr. Hancock, Secretary of the State Board of Pharmacy.

UNIVERSITY—REPLACEMENT OF BOOKS

May 7, 1925.

In the matter of replacement of books in the University Library

The statute in relation to the State furnishing its own publications to the library of the University of North Carolina is quite minute. C. S. Section 7603, requires the Secretary of State to send three copies of each bound volume of statutes to that library; Section 7665, three copies of public documents; Section 7667, three copies of Supreme Court Reports. The latter section, 7667, was amended at the recent session of the Legislature—H. B. 625, S. B. 558, so as to require five copies of the Supreme Court Reports to be sent to the University Library. We find nowhere in the statutes any authority of the State to replace old and worn volumes heretofore presented by it to the University Library. In the absence of this authority we cannot advise the Secretary of State to enter upon this replacement.

STATE SANATORIUM—\$55,000 DEBT

May 14, 1925.

In the matter of the \$55,000 debt of the State Sanatorium

The General Assembly of 1923 enacted a law to establish a sanatorium for tubercular prisoners—Chapter 127, Public Laws. In section 7 of the act there was appropriated \$50,000 for the purchase of land and erection of adequate buildings for the sanatorium for prisoners and convicts. This sum proved inadequate, so Dr. McCain of the State Sanatorium on August 13, 1924, appeared before the Governor and Council of State and explained the vital importance of completing and furnishing the prison building of the Sanatorium. This vital importance arose largely from the fact that after the purchase of the land and partial completion of the building, the fund provided for this purpose, i.e. the \$50,000 proved inadequate. It would not do to leave the building in the condition it was because if the work was stopped, the expense to the State would be largely increased, and it derived no benefit from the building as it stood.

In consequence of this application, the Governor and Council of State, recognizing the emergency, adopted the following resolution:

Resolved, that the Superintendent of the State Sanatorium, by and with the consent of the board of trustees, borrow an amount not to exceed \$55,000 for the completion and furnishing of the prison sanatorium building, and that the State Treasurer is requested to negotiate the loan for the superintendent.

This loan was negotiated and the building completed and equipped. At the recent session of the Legislature, so we are informed, the Sanatorium presented this indebtedness in its request to the Budget Commission. It again presented the matter to the appropriations committee and was informed (so Mr. Harrison tells us) that the matter would be taken care of. For some reason this was not done, as the sum appropriated to the Sanatorium in the permanent improvements act of that session, namely, \$137,000, was

absolutely essential for the erection of improvements to the Sanatorium proper.

It thus resulted that no specific appropriation was made by the General Assembly of 1925 to take care of this outstanding indebtedness of \$55,000. The opinion of this office, then, is requested upon the legal status of this debt now, and whether or not in other acts enacted by the General Assembly of 1925 it may be taken care of in any way.

Sub-section (a) of section 6 of the permanent improvements act of 1925 is as follows:

Sub-sec. (a) To reimburse the general fund for principal and interest paid out of said fund for permanent improvements at the charitable and other institutions of the State prior to January 1, 1925, and which was authorized by various laws of the General Assembly amounting to \$1,254,500.

We are informed that the \$55,000 in question was not included in the amount set out in sub-section (a). It is, we think, plainly also not such an indebtedness as is to be taken care of by the act to permit the Governor and Council of State to authorize the State Treasurer to borrow money in an emergency, enacted also at the recent session of the General Assembly, as this amount is not for the support of the institution within the meaning of that term as used in section 1 of this act.

The general fund note act of 1925 seems, however, to meet the situation. Stated generally, the purpose of that act was to fund all outstanding indebtedness of the general fund of the State as it would appear at the end of the fiscal year 1924-25—July 1, 1925. In other words, it was intended to make a clean slate at that time so that proper measures might be adopted to keep the current expenses of the State within its current income.

Now, this \$55,000 is plainly a moral outstanding liability of the State, whether legal or not. The money has been borrowed by the Treasurer of the State under instructions from the Council of State, and to the repayment of this sum the general credit of the State is pledged. It is, therefore, we think, plainly a liability of the general fund of this State and as such should be included in the amount protected by the particular act now being discussed.

It has been suggested, however, that the General Assembly not having made specific provision for the payment of this \$55,000, it should be taken out of the permanent improvements fund provided for the Sanatorium in the permanent improvements act of 1925, i.e. the sum of \$137,000 so provided. The act, however, in its preamble states that it is necessary that certain institutions and State buildings be permanently enlarged, improved and equipped. It appears from this, as well as from the general tenor of the act, that it is dealing with additional improvements to be made to the State institutions after the date of its ratification, March 9, 1925.

If, however, our conclusion that this fund should be taken care of in the general fund note act is not a proper interpretation of that act, then we have an indebtedness of the State at large, outstanding, unprotected, and uncared for.

STATE COMMISSIONS—FEES

May 21, 1925.

Your letter of May 18th received. C. S. 3859 has been carried forward in the third volume and is still in force. Therefore, you should charge and collect the fees therein provided on commissions issued to judges, solicitors, senators, representatives in Congress, etc.

I also advise that by the express provisions of this section you are entitled to retain 50 cents of these fees for your services.

CRIMINAL APPEALS—APPEAL BOND

May 25, 1925.

In the matter of the appeal of Henry D. Griffin

The papers sent by you to this office do not recite the facts as fully as we would desire in order that our opinion upon the question presented might have the force it should have. We assume, however, that after the conviction of Griffin in the Superior Court of Martin County and after judgment upon such conviction, he gave the usual notice of appeal to the Supreme Court and the Judge presiding fixed the amount of his bail bond pending appeal and also the amount of his cost bond on appeal.

It seems that Griffin has executed the bail bond with proper sureties to the amount required by the Judge, \$50,000, and that this bond has been approved by the Clerk, the sureties thereto justifying in adequate amount to make the bond sufficient to secure his appearance at some ensuing term of the Court.

It is very clear that the execution of the bail bond in no way stays the execution of the sentence. The act of 1887, Chapter 191, section 1, and the act of 1887, Chapter 192, section 4, are brought forward in the Consolidated Statutes of 1919 as section 4654, omitting, however, a portion of section 4 as contained in Chapter 192, which will be referred to hereinafter.

There are two ways under the statute by which a defendant can appeal to the Supreme Court from the judgment upon conviction of a criminal offense: One is without security for cost upon proper affidavit made. No other official than the judge presiding can permit appeal in forma pauperis and that permission must be granted during the term of the court and signed by the judge himself. The Supreme Court thus holds in *State v. Parrish*, 151 N. C., 659, and numerous cases since. This opinion of the Court is based upon the wording of the statute itself, for it specifically imposes the duty upon the judge.

The second method is upon the defendant executing an appeal bond in the sum fixed by the court. We understand that Judge Sinclair in the court below fixed the amount of the appeal bond in the instant case at \$50. This appeal bond is not now and has not been since 1905 required to be executed and filed during a term of the court. Up to 1887 in North Carolina the appeal in a criminal case vacated the judgment. The act of 1887 declared that that should not be the effect of the appeal, nor should the execution upon such conviction be stayed except upon an order to appeal in forma pauperis

or the filing of the appeal bond for cost by the defendant. The act of 1887, Chapter 192, section 4, contained this clause:

The Judge shall direct a stay of execution during the pendency of said appeal.

This clause continued to be the law in North Carolina until the commissioners revising the statutes in 1905 struck it out, and the effect of this was to stay the execution upon the filing of the proper appeal bond or a proper order from the judge permitting the defendant to appeal in *forma pauperis*. The judge must allow an appeal in *forma pauperis* as the statute still stands. He has, however, after he fixes the amount of the appeal bond, nothing further to do with the stay of the execution arising from the fact that the appeal bond has been executed.

This is the interpretation which the Court tacitly puts upon the act since the amendment of 1905, in *State v. Parrish*, *supra*. There have been, indeed, several cases similar to *State v. Parrish* in the last few years in the Supreme Court where a deposit was allowed to be made in that court in lieu of bond. If, therefore, the defendant Griffin files with the Clerk of the Superior Court of Martin County a proper appeal bond, adequately secured, in the sum fixed by his Honor, Judge Sinclair, he can do so, though the term at which he was tried has expired. If this proper appeal bond is certified to the warden of the State's Prison by the Clerk of the Superior Court of Martin County under his hand and seal, this, we think, would amount to a stay of execution pending the appeal. If the bail bond in the sum of \$50,000 meets the requirements of the court at the time the order was made and the clerk has passed upon the adequacy of the sureties, then upon these facts being certified of record by the Clerk of the Superior Court of Martin County to the warden of the Penitentiary, the defendant Griffin would be entitled to his discharge pending the appeal to the Supreme Court.

APPROPRIATIONS—REVERSION

May 30, 1925.

In reply to your memorandum of May 28th. You state therein that some of the institutions of the State will on June 30, 1925, have a balance of funds due them under the appropriation act of 1923 for permanent improvements. You inquire whether or not in the opinion of this office these balances should continue to be available to these institutions after that period, the end of the fiscal year. Section 19 of the budget act declares that all unexpended appropriations shall revert to the State Treasurer to the credit of the general fund at the close of the biennial fiscal period. There are two exceptions to this general provision. (1) Capital appropriations for the purchase of land or the erection of buildings or new construction shall continue in force until the attainment of the object or the completion of the work for which such appropriations are made; (2) (This applies only to maintenance appropriations) Appropriations heretofore made by the General Assembly and

paid out by the State Treasurer. The first exception manifestly takes appropriations for permanent improvements out of the reversion provision and consequently, it does not apply to such appropriations.

STATE INSTITUTIONS—INDEBTEDNESS

June 12, 1925.

In the matter of the State Home and Industrial School for Girls

We have considered carefully the letter of Miss McNaughton to you dated May 29th, and we return it and accompanying paper to you.

It seems from her communication that the audit of this institution has not been finally concluded. Enough appears, however, to show that the institution will have a debit balance to the amount, probably, of \$30,000. We know no way by which this debit balance can be taken care of under existing legislation except under the general fund note act of 1925. If, however, you should determine not to take care of it under that act, the balance of the indebtedness having been incurred in the support of the institution, it may probably be taken care of under the emergency act if there was a failure of the General Assembly to provide an appropriation for this debit balance. The facts as to this we do not know.

APPROPRIATION—PERMANENT IMPROVEMENTS

June 17, 1925.

The supplemental permanent improvement act of 1925 provides that of the appropriation of \$68,000 for permanent improvements at Caswell Training School, the sum of \$5,000 shall be used for equipment for industrial building and \$5,000 for repairs and completion of the laundry, and "sufficient amount shall be used to complete the water system and the balance shall be used for the completion and repair of the present buildings and for no other purposes." I understand that certain improvements were in process of completion at the Institution when this act was passed. From the fact that the supplemental act directs that certain parts of the appropriation shall be used "to complete" or "for the completion" of certain projects, I reach the conclusion that the fund provided (to the extent that may be necessary) may be used to pay the accounts contracted for the completion of the enterprises specified. Of course, if the amounts now due have been contracted for work on projects other than those covered by section 2 of the supplemental act, the present appropriation for permanent improvements could not be used in paying bills already contracted. I assume, however, that it was intended that the present appropriation may be used in the way indicated for the reason that section 2 refers to "the completion and repair of the present buildings."

STATE NOTES—GENERAL FUND—CERTIFICATE OF AUDITOR

June 17, 1925.

By Section 2 of House Bill 1157, Senate Bill 699, Session of 1925, "An act to authorize the issuance of general fund notes of the State," it is provided with respect to such notes that "the aggregate principal amount of said notes shall not exceed the amount the State Auditor shall certify to the Governor and Council of State to be the debit balance resulting from current operations of the general fund June 30, 1925 . . . *provided, however,* that such notes may be issued in the aggregate amount of five million dollars, notwithstanding the State Auditor shall not have so certified, it now being known that said debit balance will at least equal the sum of five million dollars." It will thus be seen that notes to the amount of five million dollars may be issued without any certificate from the State Auditor, it having been definitely ascertained at the time of the enactment of this bill that the indebtedness would amount to this minimum amount.

You ask the opinion of this office as to whether the Auditor may indicate his determination of the aggregate amount of the debit balance in two or more certificates, rather than in one. It is desired that notes under this act for five or seven million dollars be issued July 1st, and at that time the exact amount of the debit balance cannot be definitely determined by the Auditor for the reason that all of the reports and other information upon which such determination must be based will not then be available.

I am of the opinion that on July 1st the Auditor may give his certificate showing a debit balance of seven million dollars or such other amount as he may then be able to determine as existent, and may at a later time, when full information is available, give a second certificate showing the total amount of the debit balance at the end of the fiscal year, June 30, 1925. In the first certificate he should indicate that he is therein covering the debit balance then ascertained to exist, and that in the subsequent certificate he will set out definitely the total amount thereof based upon the fuller information obtained.

STATE BOARDS—COMMON EMPLOYEE

June 19, 1925.

In the matter of the inspection of prisons and prison camps

Among the duties and powers imposed upon the State Board of Charities and Public Welfare is this:

To investigate and supervise, through and by its own members or *its agents or employees*, the whole system of the charitable and penal institutions of the State, and to recommend such changes and additional provisions as it may deem needful for their economical and efficient administration. C. S. Section 5006, sub-sec. 1.

Section 5008 grants this board power to inspect also county jails, county homes, and all prisons and prison camps, particularly with reference to the condition of such county institutions. C. S. Section 7714 places the

sanitary and hygienic care of prisoners in all prisons and camps under the charge of the State Board of Health. You inquire of this office whether or not there is legal authority for the State Board of Charities and Public Welfare and the State Board of Health to impose these duties upon some agent of the two boards employed jointly by these boards, instead of each of the boards, as it is now, sending agents out upon this particular work.

The object of this is, of course, to secure the economical administration of these laws. We find in the statutes no restriction upon the power of these two boards in this particular. If, then, the work imposed upon them may be done by an individual or individuals employed by the two boards, acting jointly, as efficiently and more economically than now, we see no reason why this course should not be adopted by the two boards. The only restriction that could by any interpretation of the law be imposed upon these bodies in this regard is that contained in the Consolidated Statutes of 1924, in Sections 3861, 3861-a and 3861-c. Those sections deal with the class of clerks whose salaries have been fixed by the Governor and Council of State in one instance at an amount not exceeding \$1,800 and the other in an amount not exceeding \$3,000. The prohibition there is found in the words:

And in no case shall said clerks or stenographers or other employees herein mentioned by whatever name called or designated receive any additional compensation from the State or any department thereof.

We do not think that this restriction would apply to the joint employee of both boards for the purposes stated herein, because the salary would be fixed by the two boards for a particular employment and could not, of course, be considered as additional compensation from that fixed under the above cited sections.

STATE COTTON WAREHOUSE SYSTEM

July 9, 1925.

In the matter of the State Cotton Warehouse System

There are two acts relating to this subject, Chapter 168, Public Laws, 1919, and Chapter 137, Public Laws, 1921. The last is, of course, the effective law, but it is necessary in giving a synopsis of the present condition of this System in North Carolina to refer to both acts. Each of them states the purpose of the enactment to have been in broad terms to enable growers of cotton to withstand and remedy periods of depressed prices and to market their cotton more profitably and more scientifically. The law as it is now is brought forward as Article 18, subject: "Agriculture," in the Third Volume of the Consolidated Statutes, it being sections 4925 (a) et seq.

Administrative Features

The Board of Agriculture through a State Warehouse Superintendent administers the law and prescribes such rules and regulations as it may deem necessary and convenient for the administration of that law. The Board appoints the State Superintendent and such other assistants and

employees as may be necessary. The Superintendent is the responsible head of the whole System. He gives an official bond in the sum of \$50,000, payable to the State of North Carolina, conditioned upon the proper performance of his duties as such State Superintendent. He is to require bonds of his subordinates (in practice, usually \$5,000); he has power to lease property for warehouses in various localities where it is proper to establish those warehouses, the rent of the same to be paid from operating expenses. He is to fix the terms upon which private warehouses may obtain the benefits of State supervision. He is, so far as practicable, to coöperate with the Federal Government in the administration of its warehouse act. He is to insure, or see that it is insured, all cotton stored in these warehouses and he may sue and be sued in matters concerning the operation of the System. The subordinate employees are principally local managers, examiners, inspectors and expert cotton graders. Before the employment of a particular individual as manager, he must be recommended as a thoroughly fit and reliable man by the board of county commissioners of the county where the warehouse is located, and also by the president of some bank in that county. He must give bond, as above said, in a sufficient amount to secure the faithful performance of his duties, must have cotton stored in his warehouse, graded, stapled and classified by a Federal or State grader. His compensation generally is derived from storage charges for cotton stored in his warehouse. Those storage charges and the insurance taken out by the State Superintendent or himself are liens upon the property so stored. His further duties are more particularly set out under the next head.

Warehouse Receipts

The form of these receipts is particularly set out in Section 4925 (k). They are to be signed by the local manager and the State Superintendent or his authorized agent. When so issued, they become negotiable instruments (couiers without baggage) and are transferred by written assignment and actual delivery. The cotton which they represent can be delivered only on the physical presentation of the receipts as those receipts carry absolute title to the cotton. These receipts upon delivery of the cotton must be canceled and under the rules of the Department of Agriculture sent to the State Superintendent. The Negotiable Warehouse Receipts Act applies to these receipts except where modified by the Cotton Warehouse Act itself. See an illuminating discussion of the negotiability of these receipts in *Lacy v. Globe Indemnity Company*, 189 N. C.,..... In Section 4925 (o) machinery is provided for the duplication of lost receipts upon the execution of a proper indemnity bond.

Financing

The act in express terms excludes all liability under any conditions of the State as a corporate body for any claim arising in any way from the operation of the act. The act of 1919, Chapter 168, Section 5, required the Tax Commission to levy a tax of 25 cents on each bale of cotton ginned during the two years ending June 30, 1921. Thus was provided the financial backing essential to render the negotiable receipts universally acceptable as

collateral. The net proceeds of this tax was paid into the State Treasury as a special guarantee fund. This fund was disposed of as follows: One-half thereof was to be invested in United States, Farm Loan or State bonds, to be held strictly as a guarantee fund for the outstanding negotiable warehouse receipts, and one-half was to be invested in first mortgages amply secured to aid in the establishment of warehouses, such investment to be made by the Board of Agriculture with the approval of the Governor and the Attorney General. The State Treasurer was the custodian of the bonds and mortgage securities but had no other duty imposed upon him with reference to them. Section 5 of Chapter 137, Public Laws, 1921, modified and changed the law with reference to this particular subject in these particulars:

It continued the 25 cent bale tax until June 30, 1923, but required only 10 per cent of the proceeds of this tax to go into the guarantee fund, while 90 per cent was to be invested in the mortgage securities described above. All the interest derived from all these investments was to be available for administrative expenses. The Extra Session of 1921, Chapter 28, Public Laws, stopped the collection of this tax on June 30, 1922. Chapter 40 of the Public Laws of 1921 transferred the collection of this tax from the Tax Commission to the Commissioner of Revenue. Soon after the enactment of the act of 1921 this office held that it did not reduce the 50 per cent guarantee fund under the act of 1919 so as to render it available for loans up to 10 per cent.

Thus the guarantee fund consists of 50 per cent bond investment of the act of 1919 and the 10 per cent bond investment of the act of 1921, while the first mortgage warehouse investment consists of the 50 per cent of 1919 and the 90 per cent of 1921, with the interest on all these investments so far as necessary available for administrative expenses. The former Attorney General, Judge Manning, passed upon and approved personally all the mortgage loans while he was an incumbent of the office.

It should be stated that there has been no loss to the guarantee fund except a small amount arising out of the serious default of a local warehouse manager, all of which appears in *Lacy v. Globe Indemnity Company* above set out. There would have been no loss then had the surety bond of the manager been more than \$5,000. Recently there has been some stealing of cotton from local warehouses which has not as yet been adjudicated. There has been no loss upon any mortgage loan as in each instance we believe the security to be ample.

This is as far as the information of this office extends upon the Cotton Warehouse System of the State. It should be noted finally that the act of 1921 permitted storing of other farm products besides cotton. Whether individuals have availed themselves of this privilege or not, we are not informed.

APPROPRIATION—PERMANENT IMPROVEMENTS

July 9, 1925.

By "The Institutions Bond Act of 1925" the sum of \$90,000 was provided and appropriated to the State Board of Education for the Cullowhee State Normal School. By "The Supplemental Permanent Improvements Act" it is provided:

That of the appropriation of ninety thousand (\$90,000) dollars made to the State Board of Education for permanent improvements at the Cullowhee State Normal School a sufficient amount shall be used to complete the heating system and the connecting conduit lines to the buildings; if the entire ninety thousand (\$90,000) dollars is not required for this purpose, the balance shall be used to repair the present buildings.

It appears from a report made by Messrs. Wiley and Vaughan that the heating system for the Cullowhee State Normal School and the connecting conduit lines to the building may be completed for approximately \$30,000 instead of the larger sum which seems to have been contemplated by the former board of trustees. It appears that the buildings of the school are in fairly good condition and that a moderately small sum will be sufficient to restore the actual structure of the buildings to a sound and good state or condition. It is, therefore, apparent that the whole amount of \$90,000 will not be needed to complete the heating system and for work upon the structures at the school.

It appears that a water system has been put in for this institution, the lines laid and reservoir constructed. In doing this work the institution failed to acquire necessary rights of way and water shed. I understand that the president of the institution and others interested in its management are fearful that unless these rights of way and lands for a water shed are acquired and settlement made with the owners of the property necessary to be obtained for this purpose, that there may be an interruption of the source of supply. A supply of water for the school is absolutely necessary and the buildings, no matter in how good a condition of repair the structures may be, cannot be serviceable without a continuation of such water supply.

You ask the opinion of this office as to whether under these circumstances the board of trustees would have the right to use any part of this appropriation of \$90,000 for the purpose of acquiring the necessary rights of way and land for a water shed. It is apparent that the General Assembly intended the Cullowhee State Normal School to have the full sum of \$90,000 provided for in the Institutions Bond Act. It set out two preferential objects for which the money is to be spent. In the same act it directs how and for what purposes certain appropriations for other institutions are to be used and in most cases prohibits the use of such appropriations "for any other purposes" than those specified. No such prohibition is contained in the Supplemental Permanent Improvements Act with respect to the expenditure of the \$90,000 for the Cullowhee State Normal School.

It is clear that a sufficient sum must be spent for the completion of the heating system and that the structures composing the plant of the institution must be put in a good state of repair. When these objects have been accomplished if any part of the \$90,000 remains unexpended, such sum may be used, with your approval as Director of the Budget, for the acquisition of necessary rights of way and water shed, and any other necessary purposes to complete the water system.

This use of any remaining funds after the two preferential objects have been accomplished is further supported by the facts of the situation as it exists with respect to the use of the water supply in connection with the

buildings. In the narrower sense "repair of the present buildings" would not necessarily include the construction of the water system. But since in the larger view such repair includes placing the whole plant, including the structures, in habitable and useful condition, the use of a portion of the money appropriated for the maintenance of a water system only partially completed may be justified.

REWARD—OFFICERS

July 24, 1925.

I have yours of July 23d. I have examined carefully the papers included in your letter, particularly the letter of June 20th to the Governor written by Hon. Don Gilliam, Solicitor of the Second District, in regard to reward due W. T. Stone, J. B. Barnhill, T. Jones Taylor, E. D. Dodd, and John T. Thigpen, for their valuable assistance in bringing to justice the members of the mob who perpetrated an outrage upon Joe Needleman in Martin County. As you know, Solicitor Gilliam is a man of high character and a very able lawyer. He is thoroughly familiar with the circumstances out of which arises this claim for the reward offered by the Governor. He recommends that the full amount of the reward, \$2,000, should be paid, to be distributed among the five claimants. Three of those claimants are special officers appointed to secure evidence and arrest defendants in Martin County.

The wording of the Act, Sec. 4555, C. S. of 1919, would exclude them from any participation in the reward. We do not think, however, that this Statute should be interpreted in this literal way. We think these three men were not officers of Martin County within the rule which would exclude them from participating in the reward. They were not regular officers, but officers appointed for the affair itself, and appointed only that they might have authority to arrest when the proper criminals were discovered. I therefore join in the recommendation of Solicitor Gilliam that this amount, \$2,000, be paid to him in behalf of these five men, and be distributed by him as he recommends.

STATE INSTITUTIONS—COMPENSATION OF DIRECTORS

August 4, 1925.

I have your letter of August 1st, addressed to Mr. Nash, asking for consideration of Chapter 191, Public Laws of 1913, with respect to compensation of trustees of Caswell Training School.

By section 13, Chapter 87, Laws of 1911, the compensation of these trustees is fixed at \$2 per day and actual expenses. By section 3, Chapter 191, Laws of 1913, the above section and act were amended so as to limit compensation to actual expenses. By Chapter 150 Public Laws, 1917, the management of certain institutions was consolidated under one board. The pay of the directors of this consolidated management was fixed at \$4 per day and actual expenses. This provision became section 6158 of C. S. of 1919. By Chapter 295, Public Laws, 1919, Caswell Training School was placed under the consolidated management provided for by Chapter 150, Laws of 1917.

By Chapter 183, Public Laws of 1921, the provisions for consolidated management of the institutions named were repealed and each placed under a separate board. By that act the various sections of the Consolidated Statutes on the subject, including 6158, which covered compensation of the board of directors under this consolidated management, were repealed. This act became sections 6159 (a)-6159 (c), III C. S.

Section 3 of "An act to provide uniformity in the appointment of boards of trustees, directors and managers of various institutions maintained by the State," the same being House Bill 1635, Senate Bill 1478, Public Laws, 1925, provided for the appointment of directors or trustees for Caswell Training School. Neither this section nor any other portion of the act provides any compensation for these directors.

I fail to find any specific repeal of the provision for payment of actual expenses of this board of trustees under the provisions of section 13, Chapter 87, Laws of 1911, as amended by section 3, Chapter 191, Laws of 1913. It is hardly supposable that the General Assembly expected these directors to pay their own expenses while engaged in their official duties. It is my opinion that the members of this board are entitled to their actual expenses while engaged in the performance of their official duties, but not to any other compensation.

EXTRADITION—EXPENSE OF OFFICERS

August 13, 1925.

I have your letter of August 10th in regard to expense account of officer who went to Ohio after Rhodes Richardson and Vestie Richardson, fugitives from Justice from this State, the trip having been made under authority of a requisition issued by the Governor. I am of opinion that the Governor has authority to authorize the payment of the bill for such expense out of the appropriation for the apprehension of fugitives from justice.

STATE CHEMIST—POSTMORTEM EXAMINATIONS

August 26, 1925.

In the matter of the postmortem examination of victims of killings

Section 4518 of the Consolidated Statutes of 1919 is as follows:

In all cases of homicide, any officer prosecuting for the State may, at any time, direct a postmortem examination of the deceased to be made by one or more physicians to be summoned for the purpose; and the physician shall be paid a reasonable compensation for such examination, the amount to be determined by the court and taxed in the cost, and if not collected out of the defendant, the same shall be paid by the county.

It is evident from this section that the solicitor of a particular district may require the postmortem examination to be made when in his discretion he deems that the public interest requires it. Although the term used in the

statute is "physicians," no doubt a competent and experienced chemist could be employed under such circumstances to make the examination, particularly when it is necessary to determine the presence of any poison. Such chemist appointed for the purpose is entitled to a reasonable compensation for the examination, the amount to be fixed by the court and paid by the county if the defendant is insolvent or is acquitted at the trial. The State Chemist has no official duties to perform with reference to such postmortem examinations, nor indeed, has any other chemist employed by the State. The duties of the State Chemist are defined in Section 4684 of the Consolidated Statutes and those duties are confined strictly to matters imposed upon him by the statute for the benefit of the Department of Agriculture. If, therefore, the State Chemist should be selected to make a chemical examination of the viscera of a deceased person with a view to determining whether poison was present in that viscera, he would be designated—not as a State officer, but as an individual capable of making the postmortem examination and as such, he would be entitled to the compensation provided in Section 4518 quoted above.

In 1911 Prof. Withers (then and subsequently for years a chemist at the A. & E. College) made an examination of the viscera of a deceased person by order of the Superior Court of Columbus County, and ascertained that no poison was present. The judge presiding at a court subsequent to this finding of Dr. Withers directed the board of county commissioners to pay a fee of \$200 to Dr. Withers, together with all other necessary expenses in transporting the stomach to Raleigh, and for procuring the evidence of the coroner's inquest and forwarding the same to Dr. Withers. The Supreme Court on appeal held that all of this charge was a necessary expense which the County of Columbus through its board of commissioners must pay. The Court cites the identical section quoted above as authority for this. See *Withers v. Commissioners*, 163 N. C., 341.

APPROPRIATION—EMERGENCY

September 14, 1925.

From memoranda submitted to me by Governor Doughton and Messrs. Atwood & Nash, Architects, it appears that the central power plant here is inadequate for service of the present State Building and the new building being erected at the corner of Morgan and Salisbury streets. Extensions and improvements to the plant will cost about \$2,000. In view of the fact that these improvements are occasioned by the additional load placed on the plant for use in the new building, it would seem that the cost thereof should come out of the automobile funds and that idea was approved at the recent meeting of the commission on Buildings and Grounds.

I have examined the law with respect to the use of automobile funds as contained in C. S. 2613 (b) as amended, and am unable to advise that the language of that section is broad enough to authorize the use of any of these funds for that purpose.

It also appears that the steam main for conducting heat from the plant to the new building can be put in for \$9,300. It has been suggested that

instead of putting in this separate main, that a new one be laid of sufficient size to care for both the new building and the Supreme Court Building. The cost of this would be \$12,200. This difference of \$3,900 is for the benefit of the Supreme Court Building.

It is my opinion that both the cost of the improvements to the central power plant and of the installation of this main to take care of both buildings may be paid for out of the contingency and emergency appropriation provided for by the appropriation bill, Chapter 275, Laws of 1925, upon the approval thereof of the Governor and Council of State.

APPROPRIATION—EMERGENCY

September 22, 1925.

Your letter of the 19th in regard to necessary expenditures for connecting new Highway Building with central heating plant, received. In compliance with your request I have examined Chapter 210, Public Laws of 1925, and reach the conclusion that funds for this work may be procured under the provisions of that chapter. I may add that I think it wise to act under that chapter so that the Legislature may be given an opportunity to authorize reimbursement out of the highway funds.

I find that this act, Chapter 210, was passed on roll call on different days on the second and third readings in each House and, therefore, in accordance with constitutional requirement.

In this connection I also desire to say that I am aware of no need of increasing the heat to supply this building. Mr. Nash has made an examination of the subject and tells me that he has experienced no necessity for additional heat and that his experience is borne out by that of others in the building.

OYSTER INDUSTRY—SANITATION

October 1, 1925.

It seems that during the last oyster season typhoid fever was communicated to the consumers of oysters on account of the fact that they had been taken from waters which had been polluted by the sewage of cities and otherwise. In consequence, the consumers became frightened at the condition and oysters could not be readily sold. The oyster producers of North Carolina suffered in consequence of this condition. It is the purpose of the State to relieve that industry of this burden if it can be done under the statutes as now written in North Carolina. The scheme that is proposed is substantially as follows:

The State Board of Health is to appoint properly qualified inspectors to investigate the sanitary conditions surrounding the culture of oysters in the State, their taking, shucking and marketing. These inspectors thus appointed are to determine in the first instance the safety of a particular oyster field with reference to sewage or other contamination; second, the means by which the oysters may be safely taken, and third, the means by which they can be safely shucked and marketed. It seems clear that

thus far the State Board of Health has ample authority under Section 7050 of the Consolidated Statutes which, so far as material, is as follows:

The Board of Health shall take cognizance of the health interest of the people of the State; shall make sanitary investigations and inquiries in respect of the people, employing experts when necessary; shall investigate the causes of diseases dangerous to the public health, especially epidemics, the sources of mortality, the effect of location, employments and conditions upon the public health.

It is necessary, however, not only to ascertain facts, but to make rules and regulations which should apply to conditions developed by such investigation so as to remove them if unsanitary and improve them generally so that the oyster as a food should cease to be a menace to the health and welfare of its consumers. And so, second: By what body shall those rules and regulations be made and enforced to accomplish this result?

We think the statutory authority of the State Board of Health is not sufficient in the absence of specific legislation to provide adequate remedy for the situation as it may develop. It appears, however, that the State Fisheries Commission Board has such authority. It was originally contained in C. S. Section 1881, which is as follows:

The Fisheries Commission Board shall have power and authority to make such rules regulating the shipment and transportation of fish, oysters, clams, crabs, scallops and other water products as it may deem necessary.

Chapter 168, Public Laws of 1925, repealed Section 1881, but reenacted in identical terms the same provision in substitute Section 1878. We think that this statute gives the Fisheries Commission authority to make the rules and regulations necessary to protect the oyster industry in the particular mentioned above.

We are informed that the condition in this industry was last year so acute that the Health Department of the Federal Government in preparation for the coming season has taken action upon it by the adoption of rules and regulations to protect the sanitary condition of oysters shipped in interstate commerce. That body is cooperating with the State Board of Health in devising regulations which would accomplish the result desired. Both of these bodies then, have suggested rules and regulations which in their opinion would protect the oyster industry from destruction in consequence of conditions as they existed last year.

It would, therefore, be easy for the Fisheries Commission, acting upon the authority above recited, to adopt these rules and regulations and in conjunction with the Federal Department of Health and the State Board of Health to enforce them. The rules and regulations suggested are really for the benefit of the oyster farmer, shucker and dealer, as through the inspection of the Board of Health those that have not been contaminated in such way as to become a source of danger would go upon the market designated as fit food and so could be safely purchased and consumed. It is not necessary to enter into the particulars of the rules and regulations, because they will be before the Board at the time of its meeting.

Third. Neither the Fisheries Commission Board nor the State Board of Health has an appropriation sufficient under the appropriation act of 1925 to perform their ordinary functions and at the same time to take upon themselves this additional work. The necessity for its being undertaken is vital to the welfare of the people on the coast of North Carolina. We, therefore, advise that the expense both of the inspection and the certificates and the enforcement of the rules and regulations of the Fisheries Commission would be a proper charge against the contingency and emergency fund provided in the appropriation act of 1925, Chapter 275 of the Public Laws.

Fourth. Is it possible to make the oyster industry bear any part of the cost of this inspection as the statutes of North Carolina are now written? We think not, if the parties subject to it objected to the imposition of any part of the cost of such inspection. There is another aspect to the question, though, which is not strictly legal but in itself may prove to be a practical method through which parties interested may bear a part, at least, of the expense. As conditions were last year, and as they will be the coming fall and winter unless some measures are adopted by the State, the market for oysters will be very limited and perhaps may be entirely closed, certainly in such way as to inflict serious loss upon oyster farmers and oyster dealers. The State in the instant case proposes to go to their relief. The whole procedure is for their benefit. It is to enable them to send the containers of their oysters out into the market having stamped upon them a certificate from a responsible department of the State Government, first, that they have come from a field uncontaminated by sewage, and second, that they have been handled in a sanitary and careful way. This puts them upon the market with ample assurance that they can be safely consumed. Under these conditions there will always be a demand for oysters so treated.

We suggest, therefore, that the Fisheries Commission in conjunction with the State Board of Health provide an inspection fee in their rules and regulations, graded according to the amount and cost of labor done by the State in ascertaining the sanitary condition of the oysters, and require all dealers, shuckers and shippers to pay that inspection tax. The acuteness of the condition justifies this procedure, we think. This fund thus raised as far as it goes is to be used in reimbursing the State for its outlay in protecting the oyster industry in the State of North Carolina. We are satisfied that no one interested, understanding the situation thoroughly, can object to this assessment for their benefit.

STATE PRISON—PURCHASE OF LANDS

October 6, 1925.

You ask the opinion of this office as to the authority of the State Prison to purchase about three hundred and fifty acres of land originally a part of the Caledonia Farm but it was sold in 1920. The State is in need of additional farming land for the employment of the convicts. The authority to acquire this property as contained in the new State Prison act, Chapter 163, Public Laws of 1925, section 7705, is plenary. Having this authority,

you inquire further from what fund is the purchase price of the land to be paid. Chapter 192, Public Laws of 1925, is what is known as "The Institutions Bond Act of 1925." This act provides for the issue of bonds from the sale of which funds are to be realized for the permanent improvement of the various institutions of the State. In that act there are outright appropriations to the State Prison at page 435, to wit: Central Prison, \$149,000; Caledonia Farm, \$85,000; Cary Farm, \$20,000. There is no direct allocation of these particular funds to any particular purpose in this act. The act supplemental to this act, Chapter 215 of the Public Laws of 1925, limits the use of appropriations to particular institutions in the above act to the permanent improvements mentioned by such institutions in their request to the budget commission of 1924. We understand that there was no limit placed upon the expenditure of the appropriation to the State Prison for permanent improvements by the request of that institution to the budget commission of 1924. Consequently the funds provided in the Institutions Bond act are available for the purposes set out above, i.e., to buy additional land.

Chapter 132, Public Laws of 1925, provides for the funding of the debit balance of the State Prison as shown on June 30, 1925. Section 2 authorizes the borrowing of money to purchase fertilizers and also to purchase industrial machinery for use in the State Prison. This authority conferred upon the board of directors to establish industrial enterprises in the State Prison seems not to have been carried into effect as yet. We think this particular appropriation is not available for the purchase of additional land for Caledonia Farm as the specific purpose set out in the act is first to purchase industrial machinery and second, to purchase fertilizers prior to June 30, 1925.

It appears also from your letter that at the Cary or Method Farm there are five or six hundred acres of woodland that might be suitable for clearing and later, cultivation. You ask the opinion of this office as to what fund would be available to make this improvement if the board of directors of the State Prison should determine to make it. We think that here the permanent improvement fund provided in the Institutions Bond act specifically for the Cary or Method Farm would be available for this purpose. We do not think that the fund contemplated by Chapter 132 of the Public Laws of 1925 is available for the purpose of clearing this land.

NOTARIES—MARRIED WOMEN

November 23, 1925.

The letter of Mr. W. T. Drake inquires whether a notary public's certificate is valid or not when made by a woman who since her commission has married, in the following form:

Witness my hand and seal (etc.) Mary Gore (now Mary Gore Rogers)

with the seal bearing her maiden name, Mary Gore. We think this method of authenticating her acts as notary public by Mrs. Rogers is entirely correct.

Of course, if an unmarried woman having a notary's commission should surrender her commission and qualify under another commission to her in her name as a married woman, all difficulty and question would be eliminated. We have no doubt, though, that the other method may be adopted. It is the seal and not necessarily the name which authenticates the acts of a notary.

NOTARIES—REFUND OF FEES

December 3, 1925.

In reply to yours of December 1st. There is no way that we have been able to discover by which you have authority to return to Mr. Charles A. Burrus the taxes and fees collected by your office upon his commission as notary public. It seems that after receipt of the commission Mr. Burrus wishes to surrender it. Of course, he can resign, but that does not carry with it any authority to return money paid in by him for his commission.

INSANE PERSON—U. S. PRISONER

December 16, 1925.

In the matter of Bessie Gregory

I have examined the records in the United States District Court for the Eastern District of North Carolina and find that Bessie Gregory of Stovall, Granville County, was in November, 1910, convicted of breaking and entering the postoffice at Stovall and upon such conviction she was sentenced to imprisonment in the woman's department of the State's Prison at Lansing, Kansas, the term of her imprisonment to commence December 2, 1910. The statement, then, of Mr. Irving B. Tucker, United States Attorney, as quoted in the letter of Mr. Finney to you has thus been verified. It was some months after the expiration of her term of imprisonment that the Gregory woman was transferred from the Lansing State Prison to St. Elizabeth's Hospital at Washington, if the statement in Mr. Finney's letter is correct that she was sent to that hospital on March 17, 1923.

Revised Statutes of the United States, Section 4852 (Section 9320, Compiled Statutes, 1918) is as follows:

Insane convicts—Any person becoming insane during the continuance of his sentence in the United States penitentiary shall have the same privilege of treatment in the hospital during the continuance of his mental disorder as is granted in the preceding section to persons who escape the consequences of criminal acts by reason of insanity, unless it be the opinion, both of the physician to the penitentiary and the superintendent of the hospital, that such insane convict is so depraved and furious in his character as to render his custody in the hospital insecure, and his example pernicious.

You will notice that such insane convict has the same privilege of treatment in the hospital during the continuance of his mental disorder, the term "same" referring to the admission of insane persons accused of crime.

It is a little remarkable that the Department of the Interior should claim that a provision in an appropriation act should have the effect of modifying the above quoted act with reference to the treatment of convicts becoming insane after their commission to the United States prison or to a State prison under contract to the United States, such as was the Lansing prison at the time that this woman was sent to it. I quote now a part of the appropriation act relied upon—43 Statutes at large, part 1, page 1182:

Provided, that so much of this sum as may be required shall be available for all necessary expenses in ascertaining the residence of inmates who are not or who cease to be properly chargeable to Federal maintenance in the institution and in returning them to such places of residence.

It is doubtful whether this provision applies to this woman, Bessie Gregory, because she was rightly in the institution under Section 4852 of the Revised Statutes and she still has the privilege under that section of treatment in the hospital so long as her mental disorder continues. There can be no doubt that there are other inmates of this institution to whom the proviso in the appropriation bill would apply and for whose removal the money could be spent.

If, however, the Attorney General of the United States should hold upon application to him for an opinion that the woman, Bessie Gregory, came within the class intended to be removed under the proviso, then we know no good reason why that ruling should not be effective so far as the State of North Carolina is concerned and Bessie Gregory removed under the ruling to the State Hospital at Goldsboro, the Federal Government paying the cost of her removal.

NOTARIES—RESIDENCE

December 17, 1925.

The letter of Mr. Millard Reynolds to you dated December 16 asks why he should be a resident of North Carolina for one year before he could be appointed a notary public. The answer to this question is simple: Our Supreme Court has held that a notary public is a public officer and under the Constitution of North Carolina, no one can hold a public office unless he is a voter. This is the reason why the Supreme Court held before the adoption of the Woman's Suffrage Amendment that a woman could not be a notary public in North Carolina. If Mr. Reynolds votes in North Carolina, then he could be appointed a notary public. If he proposes to become a voter in North Carolina, he must have resided in North Carolina for twelve months before he can vote.

STATE INSTITUTIONS—WARRANTS FROM TREASURER

December 19, 1925.

In the matter of countersigning of institution warrants upon the State Treasury by two members of the Board of Directors

In our oral conference you stated that this provision of the statute was materially impeding the efficiency of the various institutions in the construction of new buildings and the expenditure of their appropriations, and you required of this office an opinion as to whether or not this provision of Section 7689 of the Consolidated Statutes of 1919 had been modified or abrogated by the legislation of the recent session of the Legislature, particularly by the executive budget act and the institutions bond act.

It is proverbially difficult to sew a new patch upon an old garment. Both the old act and the new acts relating to the same subject are under the rules of statutory construction to be construed together, they being in *pari materia*. Applying this rule, the old act is to be modified or abrogated only in so far as it is necessary to effectuate the purpose of the new acts. As we understand the budget system, it was intended to deal directly not only with appropriations to be made by subsequent Legislatures, but to those made by the General Assembly of 1925 and the expenditures of those appropriations by the institutions.

Speaking broadly, at the beginning of each quarter each institution is to furnish the director of the budget with estimates of the amount from the appropriations to be expended during that quarter. All bills paid or debts incurred are also to be reported upon appropriate forms to the commission. This machinery is provided for the express purpose of securing the economical administration of the fund and also to provide a check upon any tendency to expend the fund unnecessarily or in a way not contemplated by the General Assembly.

These provisions act directly upon the governing authorities of the institutions. The machinery itself is much better adapted to securing economy in the administration of the funds as well as perfect honesty in such administration than the requirement that two members of the board of directors should approve the warrants presented to the Treasurer for his payment. This being the intention of the Legislature as indicated by the new acts, we think that this intention can be best effectuated by abrogating the requirement that two members of the board should endorse the warrant. The purpose with which such provision was incorporated in Section 7689 was identical with that in the new acts, but the machinery provided was not near so effective. If the provision in Section 7689 was intended to prevent fraud, the present law is much more effective.

For these reasons, we think that both yourself and the Treasurer would be justified in disregarding the requirement that the warrant should be countersigned by two members of the board.

DEBIT BALANCE—RESTATEMENT

December 19, 1925

You require an opinion from this office as to the modification of the statement issued at the end of the fiscal year 1924-25 in regard to the debit balance due by the State at that time.

It appears that through ignorance, inadvertence or neglect of some or the institutions, there were credits and charges to such account omitted from it at the time that it was made. We think it quite clear that from whatever cause those omissions occurred, it is proper that a restatement should be made of such debit balance showing the charges and credits as of the end of the above fiscal year which should have been included in the original statement.

How this should be done, of course, is a question of accounting and book-keeping with which we have nothing to do.

GENERAL FUND—SPECIAL FUND—BORROWING

December 19, 1925.

In the matter of borrowing money from a special fund belonging to the State for the benefit of the general fund

I had a conversation with Mr. Lacy in regard to this and he says this course has been pursued consistently by him for two or three years. That what he does is not technically borrowing, but according to this practice, the money is paid into the Treasury generally and at large is not assigned to the special fund until the necessities for that fund require it. This, of course, in practical effect is a borrowing from the special fund for the benefit of the general fund.

GENERAL FUND NOTE ACT

February 11, 1926.

You inform me that there is a deficit of the Caswell Training School growing out of the operations preceding June 30, 1925, and that there is no way of meeting these obligations out of any general appropriation made by the Legislature of 1925. You ask my opinion as to whether the amount of this deficit may be paid out of the fund provided by Chapter 112, Public Laws of 1925, the same being "an act to authorize the issuance of general fund notes of the State." It is my opinion that the amount of this deficit may be properly included and provided for under the provisions of that act.

INCOME TAX—RENT OF PARSONAGE

February 11, 1926.

I have your letter of February 1st, sending letter from Rev. L. T. Wilds, Jr., of Hendersonville. He wishes to know if a minister should include the

rental value of the parsonage supplied him by his church as a part of his income for purposes of income taxation.

I regret to say that after giving the matter most careful consideration, I reach the conclusion that the rental value of the parsonage so furnished must be included in the income tax return. Section 301 of the Revenue Act of 1925 defines gross income as including "salaries, wages or compensation for personal service of whatever kind and in whatever form paid." It has been the uniform practice of the Revenue Department to hold that a rental value of the nature in question is to be included in the income tax return. That action of the Department has been in accordance with advice heretofore given by this Department. Having reached the conclusion that the former opinion of this Department on the subject is a correct one, I do not feel at liberty to reverse the ruling.

The question has been asked as to why a clergyman must include the reasonable rental value of his house in his State income tax return and does not so include it in the return for Federal income tax. The reason is that "rental value of the dwelling house and the appurtenances thereof furnished to a minister of the gospel as part of his compensation" is specifically excluded from definition of gross income by the Federal Revenue Act and is not so excluded by the State Act on the subject. The Legislature has the right to make the State Act conform to that of the United States in this regard, but until it does so, I am of opinion that the practice of the State Revenue Department on the subject is in compliance with our law.

APPROPRIATION—EMERGENCY

February 12, 1926.

It appears that the \$200 provided as traveling expenses for the Commissioner of Pardons in Chapter 29, Public Laws of 1925 will not be sufficient for that purpose. Under the act the Commissioner at all times is subject to your direction and you have the authority to send him on such trips as may be necessary to investigate the facts with respect to applications for pardons. It appears that the work as directed by this act cannot be properly prosecuted, nor can the Commissioner carry out your instructions in making these investigations unless his expenses are paid.

I am of the opinion that the necessity of providing the traveling expenses of the Commissioner of Pardons is one of those "extraordinary expenditures" which cannot be forecasted or contemplated by the contingency and emergency appropriation of Chapter 275, Laws of 1925, and that a reasonable sum may be allocated for such purpose "to be expended upon written approval of the Governor and Council of State."

RAILROAD POLICE—RESIDENCE

February 17, 1926.

You submit to me request made to Governor McLean for the appointment of railway policemen under the provisions of I. C. S. Chapter 67, Article 9,

Sections 3483 *et seq.*, and ask my opinion as to whether the Governor may appoint as such policeman a person not a citizen of North Carolina.

These sections of the statute on the subject refer to these policemen as officers and they are required to take and subscribe the usual oath. In *McIlhenney v. Wilmington*, 127 N. C., 146, a policeman is treated and considered as a public officer. Under Constitution, Article 6, Section 7, the first and primary requisite for holding any public office in this State is that the officer be a voter. I, therefore, advise that the Governor should not appoint any one as such policeman unless such person be a citizen of this State.

JUSTICE OF THE PEACE—REMOVAL

February 25, 1926.

We suppose that this concern is complaining to your Excellency with some hope that you under the statutes of North Carolina have authority to remove justices of the peace for some corrupt or ignorant conduct on their part. We think that the Governor has no such authority. The only way by which a justice can be removed from office is, first: when he moves from his township and does not return therein for the space of six months; second, upon conviction of an infamous crime or of corruption or malpractice in office. A justice of the peace may be indicted under C. S. 4384 in a proper case. If he is convicted, he would be removed from office.

The complaint here against this particular justice is that after notice of appeal given in open court at the trial he failed to send the papers to the Superior Court within ten days. That, of course, was an omission of his duties specifically imposed upon him by the statute, C. S. 1532, when the fees for making the return had been paid, but the statute also provides the means by which this can be enforced. Indeed, if the appeal is to conform to the law and go to the next term of the Superior Court after the judgment is entered, the appellant must himself see that the law is conformed to.

It appears, then, on the statement of this concern that they probably did not avail themselves of the remedies provided by the statute in the particular case. At any rate, the Governor of the State has no duty to perform in relation to this complaint.

WOMEN—EMPLOYMENT

February 18, 1926.

You asked me this morning to give you reference to laws governing employment of women, and I herewith do so.

The Child Welfare Commission was created by Chapter 100, Public Laws of 1919, which is now I. C. S. 5031, *et seq.* Primarily, its duties have reference to child welfare, but it also has control of enforcement of "the laws relating to seats for women employees and the laws requiring separate toilets for sexes and races," I. C. S. 5031. It may employ agents for this purpose

and these agents have the right to enter and inspect enumerated plants and establishments, I. C. S. 5035, 5036. The law with respect to providing seats for women employed in stores, shops, etc., is II C. S. 6555, and for separate toilets is in II C. S. 6559-6563.

Our laws on the subject of employment of and work by women are very meager. By II C. S. 6554 a week's work for women in all factories and manufacturing establishments is limited to sixty hours, with the further proviso applicable to all labor that no employee in such establishment shall be worked exceeding eleven hours in any one day.

DEPARTMENT OF CONSERVATION AND DEVELOPMENT

March 19, 1926.

You enclose in your letter of March 16th communication from *Manufacturers Record* at Baltimore to Governor McLean, suggesting one of their publications, the 1926 *Blue Book*, as an excellent vehicle for bringing to the attention of the people of the country the advantages of the State of North Carolina. You ask whether or not the Department of Conservation and Development has authority to avail itself of this means of advertising the resources of the State of North Carolina. We think it has. There are three provisions in the statute from any one of which we think this authority could be deduced.

The first is at page 317 of the Public Laws of 1925, Chapter 122:

The board may take such measures as it may deem advisable to obtain and make public a more complete knowledge of the State and its resources, and it is authorized to cooperate with other departments and agencies of the State in obtaining and making public such information.

Again, at the bottom of page 317 and top of page 318, in the section which provides for reports and publications, after requiring the board to collect certain information, it is declared:

Such reports and information shall be published and distributed as the board may direct at the expense of the State as other public documents.

This, of course, is not directly in point, for that is confined to regular reports, but it shows the general purpose and intent of the act so to advertise as extensively as was necessary advantages of the State that immigrants may be attracted. In Section 16, bottom of page 318 and top of page 319, after requiring the board to cooperate with other departments of the State Government in collecting certain information, it goes on and authorizes it to prepare the same for publication in such a manner as may best advance the welfare and improvement of the State.

So far as these advertisements are concerned, the place where and the method by which the advantages of the State may be best brought to the attention of the public is largely within the discretion of the board. Legis-

lation, of course, could not deal with such a minute problem and consequently, it leaves it thus to this discretion.

We think, then, that this special advertisement is within the competency of the board and may be paid for out of the funds appropriated by the Legislature for its use and support.

MOORE AND NASH SQUARES

February 27, 1926.

In the matter of Moore Square and Nash Square, and the relations of the city of Raleigh to them

At the time that the City of Raleigh was laid out by certain commissioners appointed by the General Assembly of the State, these commissioners made a map of the town so laid out and reported the same to the General Assembly. The plan contemplated lots of one acre each and the total quantity of land so platted and laid off into lots was four hundred acres. After this report was made to the General Assembly, it by Chapter 14, Laws of 1792, ratified and confirmed the report and the laying off of the four hundred acres into lots and streets and thus reported by the commissioners.

In section 3 of the act of 1792 the General Assembly set aside four town lots into public squares, naming one of them Caswell Square, another Burke Square, another Nash Square and another Moore Square. All of these squares have been heretofore appropriated by the State, to its own use, i.e. the old Blind School on Caswell Square, the Governor's Mansion on Burke Square. Only Nash and Moore Squares, then, are unoccupied.

By an act ratified March 6, 1877, Jos. A. Engelhard, Secretary of State, Thomas S. Kenan, Attorney General, John M. Worth, Treasurer, and D. M. Carter and A. B. Andrews of the City of Raleigh were appointed commissioners to sell to the best advantage and in such quantities as they might deem best the real estate in and adjacent to the City of Raleigh belonging to the State and which were not at that time occupied for State purposes. These commissioners from the proceeds arising from this sale were directed to build a suitable Governors Mansion on what was then known as the Lovejoy lot, this being Burke Square of the original plan of the town. Chapter 59, Private Laws of 1876-77.

It seems that acting under the authority contained in this law of 1876-77, the commissioners did sell some of the property belonging to the State, for Chapter 134, Laws of 1883 dealt again with the subject of the erection of a residence for the Governor, and the money theretofore derived from the sale of lots in Raleigh was to be used in the erection of this building. Mr. C. B. Edwards, an old resident of the City of Raleigh, informs us that he was on the board of aldermen of the City of Raleigh at the time that this commission laid off Nash Square and Moore Square into one-acre lots again with a view to selling them to raise funds to build the Governor's Mansion; that acting under the instructions of the board of aldermen, Mr. Fab. H. Busbee, who was then city attorney, either actually applied to the court or threatened to apply to the court for an injunction against these com-

missioners to prevent the sale of these particular lots dedicated in the original act as public lots for the benefit of all the citizens of the town. Parties plaintiff to this proceeding were, of course, the citizens of the town who were interested in maintaining these lots as public lots. The principle relied upon as giving foundation for the injunctive right is thus stated in our reports:

When the owner of property has the same platted, showing lots, parks, streets, alleys, etc., and sells off the lots or any part of them in reference to the plat, this as between the parties will constitute a dedication of the streets, parks, etc., for public use, although not presently open or accepted or used by the public.

Whether or not this principle applies to the sovereign is not material here. We know that in consequence of the commencement of this proceeding or the threat to commence it, neither Moore Square nor Nash Square was sold by the Governor's Mansion commission. In recent years the governing authorities of the City of Raleigh have undertaken to maintain these parks and to enhance their beauty by setting out trees and exercising their police power in their protection. This was merely a convenient arrangement between the city and the State, which holds the title to those lots for the use of the public. Both of the squares or parks are so situated that if properly maintained, the beauty of the City of Raleigh will be materially enhanced, and the convenience and comfort of its citizens materially administered unto.

Section 7044, Chapter 315, Public Laws of 1925, requires the City of Raleigh to maintain these squares. If it fails to do so, the State may take them over.

CURRITUCK COUNTY POLICEMEN—FEES

April 16, 1926

The act that provides for the appointment of rural policemen in Currituck County and their compensation is Chapter 23, Public-Local Laws, 1924. We have considered carefully the letter of John F. Belangia to you of date April 12th in regard to these fees. Section 5 of the act is as follows:

That it shall be the duty of each policeman provided for under the provisions of this act to collect the fees for all process work rendered by him in criminal cases and the fees so collected shall be the same as now provided by law plus an additional fee of \$10 in each case where there is a conviction, and all of such fees so collected shall be retained by such policeman as compensation for his services.

As this section is written, particularly when taken alone, its meaning is obscure, but when interpreted in connection with other cognate statutes, we think it means this: That such policeman is entitled to the usual fees in criminal cases and in addition thereto \$10 in each case in which there is a conviction. This statute, however, has to be interpreted in connection

with C. S. Section 1259 which when defendant is insolvent renders the county liable for only half fees except in capital cases and in prosecutions for forgery, perjury or conspiracy. In all cases arising from the arrest of a defendant by this rural policeman or from process taken out by such rural policeman where the defendant is convicted and is solvent, the rural policeman is entitled to full fees, including \$10. If upon this arrest, however, the defendant is found not guilty and discharged, then the rural policeman is entitled to no fees at all. If, however, the defendant in proceedings instituted in any way by the rural policeman is convicted and is insolvent, then the rural policeman is entitled to only half fees, including half of the \$10 levied as part of the cost in his behalf. If the General Assembly had intended to make an exception to the general rule as set out in Section 1259, it would have provided in section 5 of the particular act that the rural policeman should be entitled to full fees against the county notwithstanding the insolvency of the defendant. This, we think, is a fair interpretation of the act in the light of existing statutes and rules of law.

STATE BONDS—COMPROMISE

May 20, 1926.

The bonds recently received by the Treasurer of the State from Mrs. Cora Newman of New York were of the following description:

Thirteen coupon bonds of the Western North Carolina Railroad issue and three bonds of the Wilmington, Charlotte and Rutherford Railroad issue.

The Western North Carolina Railroad bonds were similar to those passed upon by the Supreme Court of the United States in *South Dakota v. North Carolina*, 192 U. S., 286, and each of them was secured by a mortgage on 10 shares of stock in the North Carolina Railroad. Both classes of these bonds were dealt with in the compromise act of 1879, Chapter 98, and both of them were in class 2 as set out in section 4 of that act. Class 2 of the act of 1879 provided for the exchange of new bonds for old ones at the rate of 25 per cent of the principal of the old bonds. A great many of these bonds were surrendered and commuted under this act. When the South Dakota suit was decided against this State, however, these two classes of bonds became separated. Chapter 543, Laws of 1905, provided for the settlement of the Western North Carolina Railroad Construction bonds in the hands of Schafer Brothers. Chapter 718, Laws of 1909, provided for the settlement of other outstanding Western North Carolina Railroad Construction bonds on the same basis as the settlement with Schafer Brothers. The latter statute is brought forward in the Consolidated Statutes of 1919 as section 7444 and there has been no amendment of this particular act since 1919. The authority, therefore, of the Treasurer to pay the 13 bonds of the Western North Carolina Railroad to Mrs. Newman is found in said section 7444.

The Wilmington, Charlotte and Rutherford bonds, however, took a different course. The act of 1879 providing for the commutation of these and other bonds in section 11 declared that the opportunity to take ad-

vantage of this commutation to the bond holders should cease on January 1, 1882. This time was extended in two year periods generally from the period of the enactment of Chapter 98 to 1909. 1883, Chapter 6; 1889, Chapter 66; 1891, Chapter 82; 1893, Chapter 47, 1899, Chapter 388; 1901, Chapter 126; 1903, Chapter 39; 1907, Chapter 96; 1909, Chapter 703. The act of 1909 extended the privilege of taking up these new bonds in lieu of the old ones in the proportion provided in the act to July 1, 1910.

This statute was brought forward in the Consolidated Statutes as 7419. The Wilmington, Charlotte & Rutherford bonds were issued under authority contained in Chapter 142, Laws of 1860-61. Certain bonds, however, were issued after the 20th of May, 1861, which expressed on their face that they were payable in good and lawful money of the Confederate States. Chapter 3, Laws of 1865, dealt with this situation and made provision for the surrender of the bonds originally payable in Confederate money and the reissue in lieu thereof of bonds of the State payable in specie, Chapter 3, 1865. Bonds that were surrendered and others taken in their place, therefore, instead of running the original thirty years provided for, ran the shorter period of twenty-four years in order to make them all due at the thirty year period from the first issue.

The 3 bonds sent by Mrs. Cora Newman of this description were bonds which were issued as substitute bonds under Chapter 3, Public Laws of 1865. If we had no further legislation in regard to those bonds than that contained in C. S. Section 7419, there would be no authority to either commute them or to pay them. The General Assembly, however, in 1913, Chapter 131, Public Laws, gave the State Treasurer authority to pay cash instead of issuing bonds to take up the outstanding compromise bonds according to the provisions of Chapter 98, Laws of 1879, at 15, 25 and 40 cents on the principal only. This constitutes the authority of the Treasurer for the payment of the 3 Wilmington, Charlotte and Rutherford bonds, and the act of 1913 is brought forward in the Consolidated Statutes as section 7432, and this has not been amended in any way since.

GOVERNOR'S MANSION—REPAIRS

May 20, 1926.

Near the beginning of the present administration Mr. Everett, the Secretary of State, reported to a meeting of the Board of Public Buildings and Grounds that he had made a close inspection of the condition of the Governor's Mansion and felt constrained to report that it was absolutely necessary in order to preserve the value of this building to make certain drastic repairs and renovations. He reported that the plumbing was antiquated and was not equal in sanitary conditions to many a cotton mill in North Carolina. He requested that Governor McLean be given authority to make the necessary repairs to such building and to buy suitable furnishings for the same in a sum not exceeding \$50,000 (minutes of the Board, January 29, 1925, Messrs. Brummitt, Everett and Lacy being present). This action was taken without the knowledge of Governor McLean, who was not present at

the meeting. Upon a receipt of a copy of these minutes, Governor McLean addressed to the Board of Public Buildings and Grounds the following communication dated February 24, 1925:

After reading the report of Dr. W. S. Rankin, Superintendent of Health, and making a personal investigation of the conditions in the Executive Mansion, I have concluded that there is some work which must be done at once, in order to enable me to move my family into comfortable quarters.

I understand that under the general statute, now in existence, the Committee on Public Buildings and Grounds have the authority to spend any amount which they may deem necessary in repairing, renovating and refurnishing the Mansion, and it has been estimated that to complete the repairs and furnish the Mansion would cost something like \$75,000. I would prefer that *any substantial* amount to be expended for this purpose be appropriated directly by the General Assembly. The report of the Legislative Budget Commission recommends \$50,000 for the purposes mentioned, and their report will be presented to the General Assembly for action. Inasmuch as this money will not be available until July 1st, I have concluded to ask the Committee on Public Buildings and Grounds to proceed at once under the general authority which they have to renovate and repair three rooms on the south side of the Mansion on the second floor which will give me bed rooms, etc., for my family. This will include the large room, two bed rooms and three baths.

I should be glad, therefore, if you would proceed to have this work done as quickly as possible and at as reasonable price as possible. I would prefer to allow the matter of all extensive repairs to await the action of the General Assembly.

Under authority given by the Board of Public Buildings and Grounds, Atwood & Nash, architects, after receiving competitive bids, on February 24, 1925, placed a contract with James A. Davidson, contractor, to renovate and repair the three rooms on the south side of the Mansion on the second floor, including three bed rooms and three baths, and shown on the architect's drawing sheet No. 1, at the price of \$7,094. This contract was approved by the Board of Public Buildings and Grounds and the work was immediately proceeded under that authorization.

That Board had plain authority under the law as it existed at that time to have these repairs made—C. S. Section 7027, in which it is declared among other things:

The Board of Public Buildings and Grounds shall take charge of and keep in repair the public buildings of the State in the City of Raleigh.

This Board has acted under this authority for many years.

By an act ratified March 9, 1925, Chapter 192, Public Laws (the permanent improvement bond act), an appropriation was made in the following terms:

(c) For use of Committee on Public Buildings and Grounds for improvement and equipment of the Governor's Mansion, \$50,000.

This fund was, of course, not immediately available, so the extensive repairs contemplated in this appropriation were not entered upon until some time in June, 1925. Meantime, the work authorized by the Board of Public Buildings and Grounds had been completed and vouchers were issued to James A. Davidson, contractor, prior to June 30, 1925, in payment of the amounts due under the original contract of \$7,094, entered into on February 24, 1925.

An opinion is therefore requested as to whether the \$7,094 referred to was payable out of the general fund and not specifically out of the appropriation of \$50,000. Secondly, whether or not the readjustment can now be made and the amount charged to the general fund and the permanent improvement bond fund relieved of the same upon the same principle that has been applied in readjusting items outstanding and unpaid on June 30, 1925, in other cases.

(1) We think it quite clear that this \$7,094 was a charge against the general fund and should have been considered as such before the end of the fiscal year 1924-25 and charged to that fund. The work was undertaken under a valid contract made by the Board of Public Buildings and Grounds by authority of section 7027 hereinbefore quoted. It was immediate and necessary work. It did not in any sense partake of the general repair of the Governor's Mansion.

The General Assembly of 1925 in Chapter 315 of the Public Laws, rewrote Chapter 117 of the Consolidated Statutes which described the duties and responsibilities of the Board of Public Buildings and Grounds. Section 2 of that act is in the following words:

That until the first day of July, 1925, the Board of Public Buildings and Grounds shall use such funds as may be available for their use for the purposes of this act under the present law, and from and after July 1, 1925, it shall use such appropriations as shall be made by the General Assembly to or for them.

We think this section 2 controls in the matter, and that the \$7,094 was clearly a charge against the general fund and not against the special appropriation of \$50,000.

(2) We think the readjustment of this matter can now be made and the amount charged to the general fund and the permanent improvement bond fund relieved of this charge, as the charge against the \$50,000 was improperly and erroneously made.

NOTARIES—FEES

July 9, 1926.

The letter of Mr. J. W. Church, of Summitt, N. C., to you has been considered. Mr. Church is a notary public and as such his compensation for acts done by him as notary public is fixed by law. He is not required by law to do these acts outside of his office. Quite frequently they are done by notaries public outside of the office when they are probating papers or

doing any other duties of their office at a point near by. Mr. Church says he was called twenty miles from his office to fix up a deed and desires to know whether he may not legally charge for his day's work and expenses of going this distance.

We think his compensation is limited to his legal fees. When this party came to him to perform these services, he might have told him that he was not required by law to travel this distance and undergo the expense necessary to perform the work. Thereupon the party so employing him, if he chose, might make a private contract with him by which he would compensate him for his extra expense and loss of time for his services, but this could be done only by private contract.

OPINIONS TO THE BUDGET BUREAU

APPROPRIATION—SPECIFIC—REVERSION

July 18, 1925.

The \$3,000 appropriation of Chapter 242, Public Laws, 1923, was a specific appropriation out of which should be constructed a highway from the public highway to the grave of Anne Carter Lee by the State Highway Commission. You say that the State Highway Commission has already constructed this road at a cost of \$2,684.20 but that this sum had not been paid to the Highway Commission on July 1, 1925. You thereupon ask if the appropriation reverted to the general fund of the State under the budget act. In the opinion of this office this appropriation did not revert as it was specific in its nature and devoted to a specific purpose, and not part of the biennial appropriation for a State institution or department.

STATE INSTITUTIONS—BORROWING MONEY

September 1, 1925.

Subject: Legal Counsel—Institutions

Section 3, Chapter 207, Public Laws of 1925, is very broad and inclusive in its prohibition against any department, agency, institution, commission, bureau or other organized activity of the State employing any counsel except by and with the consent and approval of the Governor. The act, however, is capable of a construction which would permit an institution in small matters to allow an attorney a percentage of the collection for his fee. This construction may, however, be avoided by the Governor's giving blanket authority to institutions to employ counsel in this way in small matters, expressly limiting the amount that may be allowed as commissions and also the amount of the claim upon which commissions may be allowed. The act evidently intends to prohibit the Treasurer of the State from incurring an obligation to pay legal fees unless the contract for the same is approved by the Governor. Generally where a small claim is collected upon a percentage, that is one of the costs of collection and the net amount so collected goes to the institution.

Institutions Borrowing Money

Even before the establishment of the Budget System by the General Assembly of 1925, this office has always held that no institution or department of the State Government has inherent authority to borrow money even against an appropriation not at present available. Much more is this ruling effective now since the adoption of the Budget System.

STATE INSTITUTIONS—CHARTERS

September 23, 1925.

Institution Charters

The investigation of the question propounded by you in your letter of September 19 in relation to the Cullowhee State Normal School and the Appalachian State Normal School develops a peculiar situation. The General Assembly at its recent session put both of these institutions upon an entirely different basis from what they had been previous thereto. The act in relation to the Appalachian State Normal School has been omitted entirely from the printed copy of the public laws and, we are also informed, from the Public-Local and Private Laws. This, however, does not affect the validity or the existence of the law.

Chapter 270 of the public laws deals with the Cullowhee school. Section 10 of that act is identical with section 10 of the Appalachian school act, and is to the following effect:

Sec. 10. That the board of trustees are hereby authorized to establish a permanent endowment fund, to be loaned to needy and worthy students. The board may receive gifts and donations and may after furnishing lights and power to the normal school, sell excess current, if any there shall be, at a rate approved by the Corporation Commission, to the people in the community, and set aside for said endowment any moneys coming to the institution from such sources. The board of trustees are hereby empowered to make rules and regulations for the proper safeguarding and loaning of said funds.

We think these two acts control the situation with reference to these particular institutions. Previous to these acts, both of these institutions were under the control of the State Board of Education—Chapter 61, Public Laws, 1921. Indeed, the appropriation act of 1925, Chapter 275, Public Laws, in subsection (b) of section 2, directs that the appropriations made therein for these institutions be expended by the State Board of Education in accordance with the provisions of the act of 1921. The appropriation bill was ratified on March 10, 1925, so also were the two acts relating one to Appalachian State Normal School and the other to Cullowhee State Normal School. There is a rule of statutory construction which requires acts of the Legislature relating to the same subject to be construed together so as to avoid conflict, particularly when they were enacted at the same session of the Legislature and on the same day. It is not possible, however, to construe these two acts in such way as to avoid a direct conflict. So, another rule has to be applied to the situation.

In enacting the two laws with relation to these two institutions, the mind of the Legislature was directed specifically to their needs and their wants. This, in other words, was special legislation. The provision in the appropriation act was merely incidental to the main purpose of the appropriation. Section 5 of both acts (because they seem to be identical except as to application) declares that it shall be the duty of the board of trustees of the particular institution to provide for the spending of all moneys whatsoever belonging to, *appropriated to*, or in any way acquired by the particular

institution. Both acts provide for the appointment of the trustees of the particular institution by the Governor of the State. Under Chapter 61 of the Public Laws of 1921 the State Board of Education appointed these trustees. The effect of the act of 1925, as we understand it, is to put these institutions on the same basis with reference to support as the other institutions of the State. Manifestly, then, both of them come within the purview of the Executive Budget Act, Chapter 89, Public Laws of 1925.

The question particularly propounded by you is this: What effect does the direction of the Legislature that the surplus funds arising from the operation of the utilities by each institution be set apart as a permanent endowment fund to be loaned to needy and worthy students have upon the control of the Budget Bureau over the revenue and operations of the two enterprises with a view of preventing an inordinate expenditure of ordinary receipts or appropriation funds through the enterprises? It is obvious, we think, that the operation of these utilities is primarily for the benefit of the particular institution involved—that is, to supply with lights and water. This is an ordinary expense of the institution and it is permitted by the General Assembly because the lights, power and water may be more cheaply supplied than in the purchase of the same from some private corporation. So far as, then, money is expended for this purpose, it is under the control of the Budget Bureau, as much so as that expended for other purposes by the particular institution.

If, therefore, the institution sells excess current to the people in the community, the proceeds of such sale, regardless of the expense of producing the power or light, is to be devoted by express declaration of the Legislature to these permanent endowment scholarship funds—that is, the gross receipts from this source constitute the endowment fund. No part of the expense of producing the power or light is to be allocated to this particular fund. The direction of the Legislature is too specific as shown by the above quoted section for it to be otherwise, we think.

STATE CONTRACTS—LETTING

September 25, 1925.

Mr. Nash tells me that the Department has heretofore held that there is no general statute requiring the letting of State contracts to the lowest bidder. He says that the Department has uniformly advised State agencies to call for bids in the first instance and this is in line with the policy suggested by you at our recent interview on this subject.

Under Chapter 70, Public Laws, Special Session, 1924, it was provided that the contract for the construction of the Automobile Department Building should be let to the lowest bidder after advertising for bids. Chapter 141, Laws of 1925, requires separate specifications for (1) heating and ventilating; (2) plumbing and gas fitting, where the total contract exceeds \$10,000. This latter act seems to imply that the contract for these specific items shall be by calling for bids, but there is no prohibition against rejecting bids and then making such agreement as the board might determine upon for such work.

There may be other special acts with respect to particular pieces of work but as stated, we have been unable to find any general statute on the subject.

Following* the action heretofore taken by this Department of which I thoroughly approve, I, therefore, advise that while bids should be called for on all State work of any consequence, there is no obligation of the board to accept any bid presented, but that all bids may be rejected and the board or commission thereupon make the best possible terms for the construction contemplated.

STATE CONTRACTS—STATUTE

November 20, 1925.

In your letter of November 12 you state: "The State College of Agriculture and Engineering let a contract under the 1925 appropriation and prior to the passage of Act 141 of 1925, to the Northeastern Construction Company for Animal Husbandry Building, and in the sum of \$84,000, with an alternative in the contract that the construction would be completed if the 1925 appropriation would be available, and the total under the alternative being \$291,000."

You inquire what effect has Chapter 141 upon this contract with relation to separate specifications and separate biddings for general construction, heating and plumbing. There are not facts enough stated in your letter for us to determine whether the contract was valid. If valid, Chapter 141 does not affect it. We would have to see the contract itself to determine its validity. Our present impression, however, from what you state is that it is a valid contract, entered into with its various obligations stated prior to the enactment of Chapter 141. The Legislature itself cannot impair the obligation of any contract, speaking generally.

In your further memorandum of November 12 you state that many of the State institutions find it advantageous to undertake construction work under the permanent improvement appropriation on force account instead of under contract. A force account is usually undertaken without competitive bidding. We have been unable to find any statute which requires competitive bidding directly. Chapter 141, Public Laws of 1925 contemplates, however, public bidding and on such bidding letting to contract under all circumstances. It is certainly wise to have this competitive bidding where the amount involved is sufficient to justify it.

Chapter 141 also provides a standard by which the authority to do work on force account would be justifiable, namely, \$10,000. We think, therefore, that when the amount of the contract is more than \$10,000, it should in all instances be submitted to competitive bidding.

STATE CONTRACTS—STATUTE

November 28, 1925.

Contract—State College of Agriculture and Engineering

Mr. A. S. Brower brought to our office this morning a contract between the State College and the Northeastern Construction Company for the

erection of its Animal Industry building. In the opinion of this office this contract was valid, and being entered into before Chapter 141, Public Laws of 1925, was enacted, that statute does not apply to it.

SPECIAL COUNSEL—COMPENSATION

December 30, 1925.

I have yours of December 29 in the matter of compensation of special counsel.

Previous to the inauguration of the present administration, Messrs. Bynum, Hobgood and Alderman, of Greensboro, were employed to appear for the Corporation Commission in a certain action brought by the Seaboard Air Line Railway Company and the Atlantic Coast Line Railway, to determine the constitutionality of certain freight rates fixed by the Corporation Commission on certain class of goods from Wilmington, North Carolina, to an interior point. They were also employed in a proceeding instituted by the Corporation Commission of Virginia against the Corporation Commission of North Carolina before the Interstate Commerce Commission. After his inauguration, Governor McLean, under authority of Section 3, Chapter 207, Public Laws of 1925, continued this employment. The attorneys submitted a statement of per diem and fees in these two cases amounting to \$1,703.01. This account was approved by the Governor and in consequence of this approval, an allotment was made out of the Contingency and Emergency Appropriation provided in Section 1 of Chapter 275 of the Public Laws of 1925. This appropriation can be expended only upon written approval of the Governor and the Council of State. Section 3 of Chapter 207 declares:

“The Governor may employ such special counsel as he may deem proper or necessary to represent the interest of the State, and he may direct the Auditor to draw his warrant upon the Treasurer for such compensation as he may fix for their services.”

The Contingency and Emergency Appropriation is made in these words: “To provide for the calling out of the National Guard, emergency public printing, epidemics, special counsel and other extraordinary expenditures which cannot be forecasted, including investigation of freight rates, to be expended upon written approval of the Governor and the Council of State.”

On the face of these two statutes there is an apparent conflict with reference to special counsel. We think this conflict is rather apparent than real. It is evident that the appropriation was made for those purposes which required an investigation of facts before the appropriation should be available. The General Assembly, then, required this investigation to be made by the Governor and the Council of State before the appropriation should be available. Chapter 207, however, is dealing especially with the employment of special counsel in the particular instances therein set out. It confers the power to employ the special counsel upon the Governor only. A case might be imagined in which the Governor after the exercise of this authority in the employment of special counsel, might be met by a condition which would totally abrogate the authority if in the particular instance it

was necessary to obtain the written approval of the Council of State before the attorneys so employed could be compensated. In other words, the Governor is given authority not only to employ but to fix the compensation of these attorneys. He does so. If he is required to resort to the Council of State before it is paid, it is possible that a majority of the Council of State should refuse to approve the Governor's action and consequently, the attorneys could not be compensated for work and labor done and expenses incurred by them under the statutory authority of the Governor to employ and fix their compensation. Chapter 207 authorizes this employment in any case, civil or criminal, in any court, authorizes specifically the Governor to employ them. In that chapter, then, the Legislature was dealing with a special condition. In the appropriation act it was dealing with general provisions and specifically leaving to the Governor and the Council of State the determination as to whether a contingency or emergency exists which would render available such appropriation.

These two acts are in *pari materia* and so must be construed together with conflicts reconciled if possible and in such way, if possible, that both acts may be effective. This being true, we think that the Governor's direction to the Auditor to draw his warrant upon the Treasurer for such compensation as he may fix for these attorneys' services is amply sufficient to justify the Auditor in issuing his warrant upon such direction and to justify the Treasurer in paying such warrant also upon such direction. The conclusion of Section 3 of Chapter 207 gives additional force to this view. Under certain conditions the Governor is given authority to employ counsel to appear for various institutions of the State and he may not only direct the Auditor to draw his warrant upon the Treasurer for their compensation but may also direct that compensation be paid out of appropriations to the particular institution or out of the Contingent Fund. The part of the appropriation act quoted above has many instances upon which it would be operative without construing it so as to restrict the specific authority given him in Chapter 207, particularly when it is possible that that authority might be wholly nullified if otherwise construed.

EXPERIMENT STATION—PRINTING

January 22, 1926.

In re Printing, Experiment Station

I have your letter of January 21st on this subject, enclosing copy of letter from Mr. Jeter to Governor McLean. It appears from this statement that the Experiment Station does not really operate on a special fund provided by the State and that there is no fund out of which printing for it may be paid for except from the general appropriation for public printing. The situation is different from that presented to me and upon which I based my letter of December 17, 1925.

Upon the additional facts presented, I am of opinion that the printing should be paid for out of the general appropriation.

APPROPRIATION—PERMANENT IMPROVEMENT

February 10, 1926.

I have your letter of February 9th in re: Permanent Improvement Appropriation, Caswell Training School. You will recall that section 2 of Chapter 215, Public Laws of 1925, is explicit in providing that such appropriation shall be spent as therein specified "and for no other purpose." Chapter 230, Public Laws of 1925, instead of negating the intent thus expressed, supports it.

Sections 3 and 4 of that act direct that all appropriations "shall be expended in strict accordance with the budget of each institution, and the appropriation made by the General Assembly for such purposes." No power exists anywhere to change these requirements of the law.

I am, therefore, of the opinion that the two specific sums of \$5,000 each must be expended, if at all, as specified in section 2 of Chapter 215, and that the remaining \$59,000 must be used "to complete the water system and the balance shall be used for the completion and repair of the present buildings and for no other purposes." I think that the work on the fence would properly be repair and completion thereof, and that the sum suggested could be spent for that purpose. I am of opinion that no part of the appropriation can be spent for the proposed new recreation building. The water improvement is covered by the specific terms of the section. As I have heretofore advised, paying for the buildings in process of construction at the time of the passage of the act would come within its terms.

STATE CONTRACTS—LIQUIDATED DAMAGES

March 19, 1926.

I have your letter of March 17th, accompanied by request from the Director of the Budget for an opinion as to the significance of the provision for liquidated damages in the contract for erection of the Automobile Building at the corner of Salisbury and Morgan streets.

Parties to a contract may provide in the contract for liquidated damages for its breach. They may not provide for the payment of the same as a penalty for breach of failure to perform the contract. The fact that the amount to be paid is called liquidated damages in the contract is not determinative of the question as to whether it is such or a penalty. Upon a contest on the subject, the Court will determine whether the provision is really for liquidated damages or a penalty.

Usually each case is determined upon its own peculiar facts and circumstances. However, certain rules have been established which aid in determining the real meaning of the provision in question. Generally speaking, the effort is to ascertain the real intention of the parties. If that intent was to liquidate the damages at the inception of the contract and the other facts and circumstances permit, the Court will uphold such a provision. If it appears that the intent was to provide for a penalty, the provision would be disregarded.

Where the damages resulting from a breach would be uncertain and incapable or difficult of being estimated by any definite standard, a provision

of this character will generally be construed to be for liquidated damages if reasonable in amount. If the damages would be either much greater or much less than the sum named in the contract, the provision would be construed to be a penalty. If the damages arising from a breach can be easily determined or measured by a fixed standard, the sum fixed, if materially variant from the actual damages, will usually be regarded as a penalty. Purely consequential losses, not recoverable under the general rules on the subject of damages, when not more than a reasonable compensation therefor, may usually be sustained under a provision for liquidated damages.

These are some of the general rules on the subject which must be kept in mind. The weight of authority is to the effect that a clause of this kind in building contracts will be construed to be for liquidated damages rather than for a penalty. This is principally because of the uncertainty in calculating the damages which might be claimed. However, if upon a consideration of the contract and the intention and circumstances of the parties, it appears that the agreement was really intended or should be construed to be for a penalty, the Courts will so hold in passing on building contracts. 17 C. J. 960.

In *Wheeldon v. American Bonding and Trust Co.*, 128 N. C., 69, the contract provided for the payment of liquidated damages at the rate of \$10 per day for each day that the work remained unfinished after the date specified for its completion. The contract price was \$1,600. The fair rental value of the house after completion would have been \$30 per month. The Court held that the \$10 per day provided for as liquidated damages was so greatly in excess of the loss actually suffered that the provision was really a penalty.

In *West v. Laughinghouse*, 174 N. C., 214, the contract provided for liquidated damages at the rate of \$25 per day. The referee held that this was in the nature of a penalty, and therefore, disallowed it. He awarded damages on the basis of interest on the value of the building as contemplated and provided for in the contract. The Court says that this was "favoring the defendant," but approved the action of the referee.

You will thus see that the validity of the provision for \$50 per day as liquidated damages depends upon the facts and circumstances of this particular case. Unquestionably the State is entitled to such damages as it has sustained by reason of the failure of the contractor to complete the building on time. If the \$50 per day is approximately what the damages would be, then the provision is sustainable. In determining that, we should take into consideration what the rental of such a building would reasonably be, any consequential loss which the State may have sustained by not being able to occupy it on time, the contract price, and any other pertinent facts and circumstances. I can advise you more definitely if you will give me full information along these lines. This can probably be done better in a conference with you on the subject.

From my general knowledge of the situation, I am of opinion that the State should not without very full consideration surrender its claim for liquidated damages under the provisions of the contract. The State will certainly have a claim against the contractor for failure to complete the building on time. The only question is as to whether that claim should be based upon the provision of liquidated damages or upon proof outside the provision as to the damages actually sustained.

I am of opinion that any changes made in the building under the direction of the architect as permitted by the contract would have an effect upon the time within which he is required to complete the work.

DIRECTOR OF PUBLIC TRUSTS—CONTRACT

March 23, 1926.

I have your letter of the 17th, asking for opinion as to inclusiveness of I. C. S. 4388 and 4390, making it unlawful for directors of public trusts to contract for their own benefit.

It is unlawful under these statutes for such a director to sell supplies to, or to make any kind of contract with, an institution of which he is a director. His violation of the statute would not depend upon his not taking any active part for the institution or board in making the contract. It would not depend upon its being a profitable contract for him. The offense denounced by the statute is making the contract with an institution of which he is a director or trustee.

The offense would be committed if the contract is made between such board or institution on the one part and the partnership of which the trustee or director is a member, on the other part. The same is true if the contract is between such board or institution and a corporation of which a trustee or director is an officer or director.

This was decided in *State v. Williams*, 153 N. C., 595.

No case has gone to the Supreme Court involving a contract where the director or trustee of an institution was simply a stockholder of the corporation with which the contract was made. In *State v. Williams* the court specifically refused to pass on that phase of the question since it was not necessarily before it. But in *Bank v. Oil Mills*, 150 N. C., 683, our Supreme Court held that a stockholder was such an interested party that he could not serve as a juror in a case wherein the corporation in which he held stock was a party. Following the reasoning of that case, it would seem that the Supreme Court would probably say that a stockholder was so interested in a contract between his corporation and the board as to come within the terms of these statutes.

The statutes are very broad and it will certainly be the part of wisdom for boards of directors and boards of trustees of State institutions not to make contracts with corporations of which any of their members are stockholders.

CASWELL TRAINING SCHOOL—TRANSPORTATION—CLOTHING

March 31, 1925.

I have your letter of March 27th in re: Clothing and conveyances of children at Caswell Training School.

C. S. 5903 provides that if the parents of a child between the ages of six and twenty-one years of age are wholly unable to bear the expense of clothing and transportation, it shall be the duty of the county from which the child is sent to bear such cost "in the manner provided for adults in the

other section of this article." C. S. 5902 provides that if the parents or custodian of the applicant are unable to bear the transportation cost of adults admitted, the clerk shall cause them to be conveyed in the same manner as provided by law for the transfer of patients to insane hospitals. C. S. 6202, provides that the cost of such conveyance of insane persons shall be borne by the county of their settlement and paid by the treasurer of such county upon the order of its board of commissioners. These sections thus fix the responsibility of the county for transportation of inmates of Caswell Training School to and from that institution.

C. S. 5901, provides that if the parents or custodian of the applicant for admission to Caswell Training School shall be unable to furnish clothing, the clerk of the superior court of the county shall procure clothing at a cost not to exceed \$20 and that this shall be paid for out of the county treasury by the board of county commissioners upon the certificate of said clerk. It will thus be seen that from a consideration of all of these sections, having reference to your inquiry, that the county of the child's settlement is required to furnish the necessary clothing for the inmate when he is being conveyed to the institution at a cost not to exceed \$20.

It is my opinion that there is no authority for requiring the county to furnish clothing other than that as hereinabove set out.

APPROPRIATION ACT—EXCESS

May 19, 1926.

Section 5 of the Appropriation Act of 1925, Chapter 275, Public Laws, is as follows:

That if the revenue of the State of North Carolina collected for the fiscal years ending June 30, 1926, and June 30, 1927, respectively, are in excess of the appropriations made by the General Assembly of 1925, then in that event the Governor and Council of State are hereby authorized to divide such excess equally between the State equalizing fund and the pension fund for Confederate Soldiers.

(1) It is observable that this section does not amount to a command; it simply confers a discretion upon the Governor and Council of State to be exercised by them under any condition that may appeal to that discretion.

(2) It is plain also that the sum to be distributed at the proper time is the difference between collections for the fiscal years and the total sum of appropriations made by the General Assembly. If the collections exceed this total sum, then the excess is to be equally divided between the State equalizing fund and the pension fund for Confederate Soldiers. The General Assembly of 1925 dealt with all institutions and departments in the appropriation bill and appropriated money specifically for the support and maintenance of each one of them. So the appropriation must be provided in full as written by the Legislature before the excess of collections can be determined.

(3) This section of the appropriation act is to be construed in connection with section 19 of the executive budget act. That section postpones the

reversion of all unexpended appropriations to the State Treasury only at the end of the biennial fiscal period. The effect of this provision is to render available all specific appropriations to the institutions and departments of the State throughout the biennial period. Consequently, there is no way to determine what the excess of collections is over appropriations until the end of the biennium. It may well be that there could be this excess at the end of the first fiscal year, whereas, there could be a deficiency at the end of the next fiscal year. To distribute the excess, then, at the end of the first fiscal year would be to penalize the particular institutions or departments at the end of the second fiscal year.

STATE INSTITUTIONS—TREASURERS

June 18, 1926.

In reply to yours of June 16th. You state in your letter:

Many of the institutions have treasurers other than the State Treasurer as ex officio, and the board of an institution or the treasurer himself, and who is also a member of the board, select a bank as a depository. May such board of directors or trustees, or the treasurer of an institution, select a bank as a depository when such bank has officers or stockholders who are members of the institutional board?

It is very clear that this should not be done when a member of the board or the treasurer himself is an officer of the bank. This, of course, includes directorships. It is not so clear that an offense would be committed under section 4308 C. S., if the treasurer or member of the board was a simple stockholder.

The only case in the State of North Carolina which deals with this particular question is *State v. Williams*, 153 N. C., 595. That case determines that an offense would be committed against the act if the member of the board was an officer in the corporation dealt with by the board, but it also expressly disclaims to hold that being a stockholder would prevent dealings with the bank or corporation, so this particular question is as yet undetermined.

It is always well, however, as a practical matter for this kind of dealing by boards of institutions to be above suspicion. We advise, therefore, that in all instances, whether a stockholder or an officer, that deposits should be made in an independent bank.

BALLOTS—PRINTING—COST

June 23, 1926.

I have your letter of June 22d. You state that claims had been presented by Yancey County for one-third cost of printing ballots in the recent primary under the provisions of section 28, Chapter 37, Public Laws of 1924. You ask if payment should be made out of the appropriation to the State Board of Elections or out of the appropriation for public printing.

I am of opinion that under the provisions of Chapter 134, Public Laws of 1925, as amended by Chapter 247, Public Laws of 1925, payment should be made out of the appropriation for public printing.

STATE EMPLOYEES—UNIFORMS

July 16, 1926.

*Uniforms for watchmen and janitors under Board of Public Buildings
and Grounds*

In reply to yours of July 12th. The Attorney General has heretofore ruled in a letter dated May 27th that uniforms twice a year for watchmen and janitors for the State are a legal liability of the State. The appropriation in the appropriation act of 1925 to the Board of Public Buildings and Grounds is \$70,000. The cost of these uniforms having been held by the Attorney General a legal liability of the State, we see no reason why that cost should not be taken out of the appropriation for the Board as stated. The question of the inadequacy of the appropriation for all purposes for which it was made cannot be raised until it is about to be exhausted. I know no other way by which this question can be settled otherwise than as suggested herein.

OPINIONS TO PARDON COMMISSIONER

PARDON—CONDITIONAL—REVOCATION

May 29, 1925.

You propound this question to the Attorney General: Does the Governor of North Carolina have the authority under the law to revoke a conditional parole granted by him or his predecessors after a period of time in which the sentence would have expired had not the prisoner been paroled?

You will pardon us for calling your attention to the fact that the Constitution of North Carolina does not recognize what is ordinarily understood as a parole. It does provide for reprieves, commutations, and pardons, absolute or conditional. With this modification (which may appear to you hypercritical), we answer your question, "Yes," under the authority of *State v. Yates*, 183 N. C., 754.

CAPITAL CONVICT—INSANITY

June 11, 1925.

It seems that the Governor, upon suggestion that Cheatham Evans, a capital convict now awaiting execution in the Penitentiary, has become insane, appointed a commission of experts to determine the question of his present insanity, and that they have reported that he is now insane. Upon this, you inquire: Has the Governor authority to transfer Cheatham Evans to the Department for Dangerous Insane of the State Hospital at Goldsboro (Evans being a colored man); or has he authority to transfer him to some other section of the State Penitentiary in the Central Hospital?

Nearly all the other states have statutes which provide procedure for determining the sanity of capital convicts after judgment and before execution. In North Carolina, however, we have no such machinery. The only section that may possibly deal with such condition is C. S. Section 6238, regulating the disposition of convicts becoming insane after having been committed to the State's Prison. We think that this section does not fit the condition arising in the instant case. The power to reprieve such convict is, however, imposed upon the Governor of the State by the Constitution itself. As incident to this power of reprieving, we think the Governor may include in his reprieve for a certain specified period to be determined by him the order that the capital convict, Evans, be transferred from the death chamber to some other section of the State's Prison at Raleigh in order that Evans might be safely kept and be subjected to observation and treatment during the period of the reprieve.

At common law, as you no doubt know, a capital convict could not be executed if it is determined that he has become insane since the period of his conviction and the judgment thereupon, and the time fixed for his execution. Blackstone, Book 4, p. 395; 1 Hale, P. C., 34, 35; 1 Chitty Crim. L.,

760. If action should be taken under Section 6238 of the Consolidated Statutes to transfer Cheatham Evans to the Hospital for Dangerous Insane at Goldsboro, the proceedings by the terms of the section are to be such as are taken in the case of other alleged insane residents of the State. We advise, therefore, that the Governor act upon his constitutional power in the manner above suggested.

CONVICTS—COUNTY—COMMUTATION

July 17, 1925.

It seems that the Highway Commission of Hertford County in the exercise of supposed authority contained in Section 3678 of the Consolidated Statutes ordered the discharge of a prisoner convicted in Hertford County and sentenced to the roads of that county for eighteen months, after that prisoner had completed a service of ten months and twenty-two days. The latter service, of course, is more than fifty per cent of the term of eighteen months. Section 3678 contains this rather remarkable provision:

The county road commission is also authorized in their care and work of convicts to divide the prisoners into classes or groups according to the character of the prisoner, and work any and all such prisoners as they deem best without guards and without stripes. Prisoners worked in this manner without guards and stripes shall be known as honor prisoners and shall be entitled to receive a reduction of at least twenty-five per cent and not more than fifty per cent of the time they are sentenced for satisfactory work and good behavior.

This act is of exceedingly doubtful constitutionality on the ground that it impairs the constitutional prerogatives of the Governor. This, however, may be put one side, for the particular statute quoted above is not applicable to Hertford County. Chapter 347 of the Public-Local Laws of 1921, is the special law applicable to that county. Section 10 of this act provides a different rule for the commutation of the sentence of prisoners worked upon the roads of Hertford County from that provided in Section 3678. It is stated thus in Section 10:

The commutation now allowed by law for good behavior of prisoners in the State's Prison shall apply to prisoners worked on the roads of said county.

The commutation allowed prisoners in the State's Prison is defined in C. S. Section 7725. We think it clear that the board of road commissioners of Hertford County can allow the commutation provided in the latter section to the prisoners worked upon these roads, but they cannot apply the rule attempted to be set up in C. S. Section 3678.

We are sending copy of this letter to Honorable Lloyd J. Lawrence, Murfreesboro, N. C.

CONVICT—ESCAPE—ARREST

October 6, 1925.

You state that Charles Johnson was convicted in 1921 of murder in the second degree and sentenced to serve not less than five years nor more than eight years in the State Prison. He later escaped and is now a fugitive from justice. You have reliable information that his whereabouts is well known to the sheriff of Wilkes County but that this officer has absolutely refused to arrest the prisoner. You ask us to rule as to whether or not the Governor has any legal authority to declare such escaped felon an outlaw, thus making it possible for officers other than Wilkes County authorities to take the fugitive. We think he has not such authority. We call your attention, however, to this provision of subsection 2 of section 7707, Chapter 163, Public Laws of 1925:

Any citizen of North Carolina shall have authority without warrant to apprehend any convict who may escape before the expiration of the term of his imprisonment and to retain him in custody and redeliver him to the State Prison Department.

In the same section the board of directors of the State Prison may provide for offering a reward and pay the reward and expense of recapture to any person making the same. Of course, if the Governor chooses, he may supplement this State Prison reward with another reward conditioned upon delivery of the prisoner to the State Prison.

DANGEROUS INSANE—COMMITMENT—DISCHARGE

February 16, 1926.

In the matter of Raymond Leach

Leach appeared before the May Term, 1924, of the Superior Court of Rowan County to answer a charge of statutory burning. When the cause came on for hearing, the following proceedings were had:

This cause coming on for trial, before the jury was empaneled it was made known to the court that the defendant was insane and unable to plead to the bill of indictment for the reason that he did not have sufficient mental capacity; thereupon the Court requested R. Lee Wright, Esq., a member of the Rowan bar, to act as the friend of the Court and of the defendant, and the jury was duly empaneled and the following issues submitted to the jury:

(1) At the time of the alleged burning did the defendant have sufficient mental capacity to commit the crime alleged in the bill of indictment?

(2) Has the defendant now at the time of this trial sufficient mental capacity to plead to the bill of indictment?

The Court instructed the jury if they answered the first issue "No" that they need not answer the second issue, but that if they answered the first issue "Yes," they should answer the second issue. The jury answered the first issue "No."

Upon the coming in of the issues it is ordered and adjudged that the defendant having been found by the jury to be insane at the time of the alleged committing of the crime set out in the bill the court so adjudges the defendant to be insane at the time of the alleged crime.

It is therefore ordered and adjudged that the defendant be confined in the hospital for the dangerous insane, there to remain until discharged according to law.

It is further ordered and adjudged that a copy of the evidence taken in the trial be attached to a copy of this order and delivered to the proper authorities in charge of the hospital for the dangerous insane.

W. F. HARDING, *Judge Presiding.*

It is manifest from this that the defendant was acquitted of crime because at the time of the alleged burning he did not have sufficient mental capacity to understand the nature and character of the act committed by him. At the present time there is evidence that he has recovered his sanity. The question is thereupon propounded to this office as to how he is to be discharged from custody, having been fully restored.

The third volume of the Consolidated Statutes, section 6239, deals directly with this question in the following language:

No person acquitted of a crime of less degree than a capital felony on the ground of insanity and committed to the hospital for the dangerous insane shall be discharged therefrom except upon an order from the Governor. . . . *Provided*, that nothing in this section shall be construed to prevent such person so confined in such hospital from applying to any judge having jurisdiction for a writ of habeas corpus.

In order, however, that the jurisdiction of the judge to whom application has been made upon a writ of habeas corpus can be exercised in the particular case, it is necessary that the superintendents of the several State hospitals shall have examined the applicant and found him to be sane and shall certify that his detention is not longer necessary for his own safety or the safety of the public. It was in consequence of this ruling of the Court in *State v. Boyette*, 136 N. C., 415, that this particular section was provided in this way. We interpret the statute as giving the Governor authority to investigate the condition of the prisoner with reference to his safety and to order his discharge if the Governor is satisfied that the applicant is sane, and that his detention is no longer necessary for his own safety or the safety of the public.

Under circumstances of this kind it would not, therefore, be necessary for the prisoner to apply for a writ of habeas corpus. We do not think, however, that this authority of the Governor in the statute if his decision is adverse to the prisoner extends so far as to deprive the prisoner of his right to apply to the courts for a writ of habeas corpus to determine his present sanity under the rules set out in the proviso to section 6239. The reasoning in *State v. Boyd* would certainly render this provision of the statute giving the Governor arbitrary power unconstitutional. Indeed, there are cases cited in Boyd's case which deal directly with this particular point. No man's liberty can be subjected to the exercise of the discretion of any particular person or official.

Interpreted in this way, then, we think the Governor has authority to investigate the condition of Leach at the present time, and if he determines that he is sane and that his detention is no longer necessary for the safety of the public, he may instruct the superintendent of the hospital to discharge the prisoner. This statutory burning seems to come within the definition of crimes which refer the commitment of a person acquitted of a crime to the hospital for dangerous insane when so acquitted on account of insanity at the time of the act. *State v. Craige*, 176 N. C., 740.

STATE CONVICT—TEMPORARY PAROLE

May 21, 1926.

In your letter of May 20th you propound two questions to this office which will be taken up seriatim, with the answers attached:

(1) Has the Governor the authority to commute the sentence of John Jones, sentenced for thirty years in the State's Prison, to a minimum of five years and a maximum of ten years, with such conditions as the Governor may see fit to impose?

Answer. Section 6 of Article 3 of the Constitution, so far as material to this discussion, is as follows:

The Governor shall have power to grant reprieves, commutations and pardons after conviction, for all offenses (except in cases of impeachment) upon such conditions as he may think proper.

The Constitution of North Carolina in the particular under discussion was transcribed from the Ohio Constitution. Each one of the terms used in this constitutional provision, "reprieves, commutations and pardons" has its distinct definition. A reprieve is the withdrawing of a sentence for an interval of time whereby the execution is suspended. A commutation is a change of the punishment to which a person has been condemned to a less severe one. Pardon is an act of grace which exempts the individual on whom it is bestowed from the punishment the law inflicts for the crime he committed. In each one of these instances the Governor may attach such conditions as he may think proper. Consequently, under our Constitution he has as much power to grant a conditional commutation as he has to grant a conditional pardon. A conditional pardon is one which becomes void when some specified event happens. Therefore, we answer "Yes" to your first question.

(2) Is it necessary for a prisoner sent under guard to his home to attend a funeral or for any other reason to be given a parole by the Governor of the State, or otherwise stated, is it sufficient for the Superintendent of the State's Prison to send a man in custody in such cases and return him to the State's Prison without an order from the Governor?

Answer. The term "parole" was recognized in the old statute, which has been repealed, creating the advisory board of parole. It has been further recognized in the redraft of the State's Prison act, Chapter 163, Public Laws of 1925, in section 7749. That section deals with parole by the Governor of convicts in the State Prison Department to be used in labor upon the

State buildings and grounds in Raleigh or any other work in which the State may be engaged. As used in that section, it conforms to the definition. It is defined as a form of conditional pardon by which the convict is released before the expiration of his term, to remain subject during the remainder thereof to supervision by the public authority and to return to imprisonment on violation of the condition of the parole. These definitions are discussed in a full and enlightening way in *State v. Peters*, 43 Ohio St., 629.

There is, therefore, no authority anywhere in our statutes by which a prisoner confined in the State's Prison may be permitted to return to his home temporarily to attend a funeral or for other compelling personal reasons except through the power of the Governor to grant this form of conditional pardon. It would be an escape on the part of the State Prison authorities to act independent of the exercise of the Governor's prerogative in this regard. It is really a parole by the Governor of the prisoner for a short time in order that he may answer some of the higher demands of our nature and be returned when that is concluded at once to the State's Prison, to continue the service of his sentence.

PARDON—CONDITIONAL—FUGITIVE FROM JUSTICE

June 4, 1926.

In re John Lewis

John Lewis was convicted of second degree murder at the February Term, 1921, Superior Court of Alexander County, and sentenced to serve not less than seven nor more than ten years in the State's Prison. On July 14, 1925, Honorable A. W. McLean, Governor of North Carolina, granted a conditional pardon to Lewis. The condition of said pardon was as follows:

That he be a law abiding citizen and engage in gainful employment. "I reserve the right to revoke this parole at will and for any cause satisfactory to myself."

This parole or conditional pardon was accepted by John Lewis and he was discharged from the State's Prison, subject, however, to the Governor's revocation of the parole at any time that he deemed it best. It is suggested in the file of papers which accompanied your letter that one of the inducements to the granting of this conditional pardon was the promise of Lewis to pay over to the widow of the man whom he killed, Mrs. Powers, the sum of \$1,000. This, however, is not made a condition of the parole. On the contrary, in the parole itself there is no allusion to these terms. If the parole had made the payment of the \$1,000 a condition precedent to its operation, why, Lewis would not have been discharged until he had complied with it. It is not in terms made a condition subsequent, and failure to comply with which the conditional parole would be forfeited.

The rule of law is that in conditional pardons or conditional paroles the conditions to be operative should appear on the face of the paper. 20 R. C. L., 552, section 34. There is no suggestion in the record as sent to our office that Lewis had not conformed with the condition in regard to his

being a law abiding citizen and engaging in gainful employment. So far as we know, he has complied with this condition subsequent. He, however, accepted the parole subject to the condition that the Governor might revoke it at will and for any cause satisfactory to himself.

On June 2, 1926, the Governor did revoke the parole and directed the warden of the State's Prison to have him arrested and returned to the State's Prison for the completion of his term.

In *In re Williams*, 149 N. C., 436, and in *State v. Yates*, 183 N. C., 753, it is said that the power of the Governor to grant a conditional pardon is restricted only by the fact that the condition attached to it be not illegal, immoral or impossible of performance. There is nothing illegal, immoral or impossible of performance in the condition upon which this man accepted the parole, that it was subject to revocation by the Governor at any time that he determined that it should be revoked. The procedure in the case up to the revocation of the pardon is correct.

The effect of the revocation is, of course, to require the convict, Lewis, to be returned to the State's Prison to serve out the remainder of his term. It is expressly declared in C. S. Section 7756 (Chapter 163, Public Laws, 1925):

If any person be reimprisoned by order of the Governor for violation of the conditions of his parole, the time which such person has been out on parole shall not be deducted from the term of imprisonment to which he was originally sentenced by the court, but the time of his imprisonment shall be understood as continuing from the time he was discharged on his parole.

This North Carolina statute meets a decision of the South Carolina Supreme Court in *Crooks v. Sanders*, 115 S. E. Rep., 760. The State's Prison statute, Chapter 163, Public Laws, 1925 (section 7707, subsection 2, C. S.), requires the board of directors of the State Prison Department to provide for the recapture of convicts escaped from the Prison. Lewis is not amenable to arrest in North Carolina, he having removed to South Carolina after receiving his conditional parole and is now in that state. As a consequence, in order to obtain his extradition from South Carolina under section 5278, Revised Statutes (section 10, 126, Comp. Stat., 1918), the Superintendent of the State's Prison must make an affidavit before some magistrate, setting out the facts going to show that Lewis had been committed to his Prison, had been discharged therefrom upon a conditional parole, that the conditional parole had been revoked by the Governor and duly certified to his office, and that Lewis is now a fugitive from justice within the State of South Carolina. When this affidavit is properly made, setting out all the necessary facts as stated, then the further procedure follows as provided in the above quoted section. It is not necessary to conform to the rules as provided in the Consolidated Statutes so far as a certificate for a solicitor is concerned, but Rule 7, page 655, III C. S. must be complied with. The motive with which Lewis left the State cannot, of course, affect the question of his being a fugitive from justice. He was in North Carolina at the time the crime for which he was convicted was committed and is now to be found in the State of South Carolina. This constitutes him a fugitive from justice, particularly when the sentence upon his conviction has not been complied with.

OPINIONS TO THE SECRETARY OF STATE

AUTO TRUCKS—CARRYING CAPACITY

October 22, 1924.

Your letter of October 20th, enclosing letter to your office from the C. R. Sutton Auto Company, received. Your inquiry involves a determination of the terms "carrying capacity" in section 2612 of the Consolidated Statutes. These terms are used as the standard by which the license tax for trucks may be measured. We interpret them as equivalent to the maximum capacity of the truck when loaded and used for hauling purposes. If you were to adopt any other standard than the maximum capacity, there would be variations in levying the tax, which we think the statute did not contemplate. That the truck may be overloaded on occasion would not, of course, affect the carrying capacity standard adopted by you. It means that capacity which, when fully loaded, the truck under ordinary conditions may carry without damage to itself or to the road, and certainly this is its maximum capacity for practical purposes.

CERTIFICATE—SMALL LOANS

February 7, 1925.

In the matter of L. H. Opplemen's, Inc.

We think you are right in objecting to the third article of the certificate of incorporation, in that it specifically authorizes the corporation to make small loans. There are two ways by which a corporation can be authorized specifically to make small loans: first, as an industrial bank; second, as a pawnbroker. If the purpose of this certificate is to authorize the corporation to make small loans in conducting its business of general merchandise, it is not necessary to have it in the certificate of incorporation. If they wish to do an industrial bank business, they must incorporate in another form. If they wish to do a pawnbroker's business, they must incorporate in another form. We think, therefore, that this particular provision should be stricken out of the certificate of incorporation.

FOREIGN CORPORATION—DOING BUSINESS

February 16, 1925.

The letter of Messrs. McNinch, Whitlock & Dockery to you dated February 14th is not quite definite enough for us to determine exactly what the point presented is. The Commercial Credit Company of Baltimore seems to deal in accounts, notes, chattel mortgages, etc., to secure accounts and notes. It

has an office in Charlotte and is domesticated in this State. The Fidelity Trust Company of Baltimore for some reason unstated is trustee for the Commercial Credit Company. The Fidelity Trust Company would like, for convenience's sake, to have the American Trust Company of Charlotte hold certain of the commercial paper, the property of the Commercial Credit Company, as its (the trust company's) agent. We are not informed as to the purpose of this holding and the extent of the authority conferred upon the American Trust Company to deal with this commercial paper thus held for the benefit of the Fidelity Trust Company. Upon this it is inquired whether or not the Fidelity Trust Company would be doing business in North Carolina in such way as it would be necessary for it to domesticate in this State under Section 1181 of the Consolidated Statutes.

If the American Trust Company is a simple depository of the Fidelity Trust Company of Baltimore, it is clear that the latter company would not have to domesticate. If it is holding this paper for the Fidelity Trust Company and collecting it for the Fidelity Trust Company, still we think that the Baltimore Trust Company would not have to domesticate, nor, indeed, would it have to domesticate if the local trust company was acting as its agent in the transaction. *Butler Shoe Co. v. U. S. Rubber Co.*, 156 Fed. Rep., p. 1. See same case, 212 U. S., p. 571. To the same effect is *In re Monongahela Distillery Co.*, 186 Fed. Rep., 220.

SHARES OF STOCK—SUBDIVISION

February 19, 1925.

In re certificate of incorporation of American Information Machine Company

The question propounded by you to this office upon the foregoing certificate arises out of article 5 of the certificate. Article 4 of the certificate complies with the statute in stating the total authorized capital stock, the number of shares into which it is divided, and the par value of each share. Article 5 gives the amount of capital stock with which it will commence business, then proceeds and gives the names and post office addresses of the subscribers for the stock, and states in three instances that the number of shares subscribed for by a particular incorporator is twelve and one-half, and in two instances that the number of shares subscribed for by a particular incorporator is eight and three-quarters. Upon this you ask whether such statement is a compliance with the statute, C. S. Section 1114.

We think not. We think that when the statute requires the statement of the number of shares subscribed for by each incorporator, that is a requirement that they shall be whole shares. The only authority that can grant permission to divide such shares up into half and three-quarter shares in a certificate is the Legislature itself. It has not done so specifically and we find on examination of the general law upon the subject, 14 C. J., p. 393, that it is declared:

In the absence of legislative authority, it seems that a share cannot be further sub-divided.

FOREIGN CORPORATION—DOING BUSINESS

February 23, 1925.

I have considered carefully the letter of Messrs. McNinch, Whitlock & Dockery to you in relation to the Fidelity Trust Company of Baltimore, Md. That company is trustee, for the purpose of holding certain securities belonging to the Commercial Credit Company, also of Baltimore, against which the Commercial Credit Company issues bonds. The Fidelity Trust Company certifies these bonds so that people purchasing them will know that they are protected by collateral in the hands of the trustee. The Fidelity Trust Company does not make collections of the collateral deposited with it as security for the bonds. The Commercial Credit Company does this work of collection itself and turns over to the trustee the proceeds of such collection.

The Fidelity Trust Company proposes to appoint the American Trust Company, North Carolina corporation located at Charlotte, N. C., its agent to act for it as a local depository or stakeholder of these collaterals. Upon this it is asked whether or not the Fidelity Trust Company is required to domesticate in North Carolina under these circumstances. We think not. We think it is not doing business in North Carolina within the meaning of Section 1181 of the Consolidated Statutes.

There is another aspect to this question, however, and to which I think I should call the attention of Messrs. McNinch, Whitlock & Dockery. The collateral trust notes issued by the Fidelity Trust Company are plainly securities under our Blue Sky law. We think they could not be sold in North Carolina without the sale having been licensed by the Insurance Commissioner.

TRADEMARK—BOTTLE

February 28, 1925.

In re Trademark, "Jones's Big Boy"

You are clearly right, we think, in saying that section 3973 C. S., does not contemplate the registration of a bottle as a trademark. And as you already have registered a label "Big Boy," we do not think you can register another as similar to this as the one above referred to.

CERTIFICATE—AMENDMENT

March 7, 1925.

In re certificate of amendment, charter of Electric Supply Company

I have examined the papers in this case carefully. They are clearly, I think, informal in that it does not appear specifically that all the stockholders of the company had notice of the meeting of the stockholders in which the vote to change the name was taken. The object of this notice is

to protect the rights of individual stockholders. If they have notice—all of them—and two-thirds vote for the change, they are bound by it. If they have not the notice required by the statute, then the stockholders not having such notice are not bound by the action of two-thirds. For this reason we would advise that in all cases where the amendment is material in the sense that it would affect the rights of individual stockholders, the provisions of the statute in regard to notice to the stockholders should appear upon the certificate presented to you for amending the charter. In this case, however, the amendment does not materially affect the rights of the stockholders and the papers contain a recital that the meeting was regularly called for the purpose of voting in favor of changing the name and indulging the presumption that all things are done regularly under such a certificate and probate, it would be well to record the certificate in the particular case, principally, however, because the amendment does not affect the rights of individual stockholders in any material way.

INSURANCE COMMISSIONER—FRATERNAL ASSOCIATIONS

March 7, 1925.

In re certificate of amendment of the charter of United Sons and Daughters of Salem

This is of the class of certificates that have to be approved by the Insurance Commissioner. Where that officer approves the certificates, it seems from the statutes that the duties of the office of Secretary of State are generally clerical. In other words, that officer has no discretion to refuse to record a certificate approved by the Insurance Commissioner. There are exceptions to this rule, possibly, that do not appear in this particular case.

STATUTE—THIRD VOLUME CONSOLIDATED STATUTES

March 24, 1925.

(1) It makes no difference whether the tax of 40 cents on the \$1,000 of capital stock of corporations is included in the Third Volume of the Consolidated Statutes or not. The act of the General Assembly which adopted that volume as part of the laws of the State prevented such adoption from having the effect of repealing the public law not included therein.

(2) The certificate which you enclose in your letter of March 24th as one requested by some person to be signed by you, requires more of your office than the statutes of North Carolina require. In other words, it is an impossible certificate and if you made it, would have no such legal effect as to permit it to be introduced in evidence. If they desire copies of any particular statutes filed in your office as custodian of such statutes, they, of course, are entitled to such copies. But to certify that no act or law of the Legislature on a particular subject was enacted at the recent session of the Legislature requires too much of your office.

FOREIGN CORPORATION—DOMESTICATION FEES

March 26, 1925.

The terms "total amount of capital stock authorized to be issued by such corporation" as used in C. S. Section 1181, authorizing foreign corporations to domesticate, must be interpreted in the light of the North Carolina law in which these terms have a definite signification. The measure of the tax, then, for such domestic corporation is 40 cents on each \$1,000 of the total authorized capital stock of the corporation. It has the privilege under article 5 of its charter of increasing its capital stock to the sum of \$500,000.

That it may be required under the Georgia law to comply with other provisions of the Georgia statute before it can increase its capital stock is not material, we think, in determining the amount of tax it shall pay for its domestication in North Carolina.

JUSTICE OF THE PEACE—IDEM SONANS

April 15, 1925.

If Mr. James A. Taylor, Register of Deeds of Currituck County, was the man whom the General Assembly intended to appoint as justice of the peace in the Omnibus Act of 1925, it makes no difference that his name was spelled therein "James H. Taylor." He has been properly appointed and should be allowed to qualify. Particularly is this true if there is no James H. Taylor resident in Currituck County who could have been appointed justice of the peace. The letter "H" when pronounced sounds so much like "A" that the mistake might readily have been made in dictating.

UNIVERSITY LIBRARY—WORN BOOKS

May 9, 1925.

In reply to yours of May 7th, in the matter of replacing worn books in the library of the University.

As a legal proposition, we find no authority for this, as we wrote Governor McLean on May 7th. The acts of the Legislature are too minute and specific. Some play of discretion, however, is always allowed to an administrative body. C. S. Section 6574 makes the Governor, Superintendent of Public Instruction, and the Secretary of State trustees of the State and document libraries. This body is authorized to make such distribution of the books, reports and publications belonging to the State as in its judgment is advisable and proper. It may be that the board of trustees may invoke this as authority to make these replacements in the manner suggested by you in your letter. As a matter of strict law, however, we do not think that this provision could be interpreted as permitting the distribution of statutes and reports in cases not provided for by the Legislature itself when it deals with the particular subject.

TRADEMARK—BOTTLE CROWNS

May 14, 1925.

Mr. John A. Scott, Attorney-at-Law, Statesville, N. C., inquires whether he can register a trade-mark for bottle crowns streaked red, white and blue. It is exceedingly doubtful whether a color used in this way can be appropriated as a trade-mark. The English courts have denied that a trade-mark was valid for a red, white and blue label and denied such trade-mark registration under the English statute. The United States Supreme Court in *A. Leschen & Sons Rope Co. v. Roderick & Bascom Rope Co.*, 201 U. S., 166, has declared that whether mere color can constitute a trade-mark may admit of doubt. Our own Court in *Blackwell v. Wright*, 73 N. C., 310, has expressed the same doubt. In order, however, for Mr. Scott's clients to obtain a valid trade-mark for bottle crowns for coca-cola and other soft drinks, they must manufacture those crowns themselves. We think they could not obtain a trade-mark to attach to crowns manufactured by other people though they may use them on bottles which they fill.

CORPORATION—MERGER—FEES

May 30, 1925.

The recent General Assembly enacted a law which provides for the merger of existing corporations heretofore incorporated under the laws of the State of North Carolina. The act itself makes no provision for the taxes and fees to be collected by the office of the Secretary of State. You thereupon inquire of us what fees and taxes you shall charge.

We have examined the act carefully and find that according to its provisions the merger of two corporations creates a new corporation. Whenever there is any reference in the act to the corporation formed by the merger of the old corporations, it is called the "new corporation." In the absence, then, of specific provision in the law, we advise that in all cases of such merger under the act you should charge the same fees and impose the same taxes as though the corporation was a new corporation seeking its charter, instead of being a new corporation established by the merger of two old corporations.

TRADEMARK—DESCRIPTIVE WORDS

June 1, 1925.

I have examined the proposed trade-mark sent us this morning for the Carolina Produce Exchange, Columbia, N. C. It is quite clear that none of these words would be a proper trade-mark, either singly or in conjunction with the others. Put in a circle with a capital "C" at the top would make the whole of it a trade-mark which you could register. The words put upon this circle, "U. S. Grade No. 1" cannot be used as part of the trade-

mark and should be eliminated entirely from it. Our own statute provides for the inspection of farm products, such as lettuce, potatoes, etc. usually known as truck, and requires them to be graded in accordance with standards provided by rules and regulations of the State Agricultural Department and the Secretary of Agriculture of the Federal Government. The State inspectors act also under authority from the Federal Government, so all farm products of this class have to be inspected although they are intended to be shipped out of the State and sold out of the State. Manifestly, any attempt to incorporate in the trade-mark the words to which we object would offend against this act, and would also be a fraud upon the public.

SECRETARY OF STATE—FEES

June 10, 1925.

Stated shortly, we think you are entitled to deduct 5 per cent as your compensation for the collection of the seal tax provided by section 91 of the Revenue Act. That section has been in the Revenue Acts for many years. Originally it levied a tax upon not only the affixation of the State seal, but also of county seals, such as those of clerks of the superior court, other county officers, and notaries public. In the course of time the collection of this seal tax was limited to the affixing of the State seal only. For sixty years the section has contained this provision:

The officers collecting the State taxes and fees may retain as compensation five per centum only, except in cases of sheriffs whose compensation shall be allowed by the auditor.

As indicating the scrambled condition of that section, sheriffs ceased to have anything to do with the collecting of seal taxes about fifty years ago. In the acts of the Legislature running from 1870-71 to 1879 the sheriffs collected the seal tax upon seals of county officers and notaries public. It has been fully twenty-five years since they ceased to collect this tax upon county seals, yet even in 1925 they have that provision: "except in cases of sheriffs." This condition of the section renders it exceedingly difficult to interpret, but there is one consideration, we think, that is conclusive upon this question, and that is this: It was in 1907 that the State officers and employees were put upon a strict salary basis and were required to pay into the State Treasury all fees and commissions collected by them. Section 85 of the Revenue Act of 1907, Chapter 256, provided:

The officers collecting said taxes and fees may retain as compensation five per centum only, *as provided in the Revisal of one thousand nine hundred and five.*

This was the first time that this underscored provision was put in the section. Why was this done? Manifestly, we think, to except this 5 per cent commission from the operation of the general law enacted at that session of the Legislature, which required all of these fees and commissions.

to be turned into the State Treasury. This clause would be utterly senseless otherwise. It has been retained in the section through 1925 simply because nothing has been done to modify that section except in a particular not material to this discussion, and that was done in 1919.

We agree with you, too, that you are entitled to the commissions on the sale of Supreme Court Reports as provided in C. S. Section 7672. That section is as follows:

Sale of Supreme Court Reports. The secretary of state shall sell any and all of the supreme court reports, both the current reports and the reprints, at such price as he deems reasonable, not less than one dollar and fifty cents per volume, but he may allow to regular licensed book-sellers in this state such discount as to him may seem reasonable and just. For his services in making such sales he shall receive a commission of five per centum upon his receipts, which commission he may deduct when he settles with the state treasurer, to whom he shall pay over, monthly, the moneys arising from such sales.

The latter clause of this section would be absolutely meaningless unless you were allowed to deduct the 5 per cent commissions therein stated from the amounts received by you from the sale of Supreme Court Reports. Unless the Legislature intended to allow you this commission, it would unquestionably have stricken this provision out in 1919, when the section was specifically amended (P. L. 1919, Chapter 195, Section 4), but it did not; instead, it was brought forward in the Consolidated Statutes and reenacted in that form, definitely and unmistakably.

TAXES—CURRENT EXPENSES

June 12, 1925.

Neither your Department nor any other department of the State government has authority to retain any portion of the taxes collected by it for current expenses of the department except where specifically authorized by statute. There is a statute, however, which permits your Department, with the consent of the Governor and Council of State, to employ any additional clerical or stenographic help. Section 3861 (d), 3d C. S.

We have answered fully your other question as to your right to the 5 per cent commissions upon the sale of Supreme Court Reports and upon the collection of seal tax in an opinion sent to you yesterday.

TRADEMARK—"PUFFED"

June 29, 1925.

We have examined carefully the papers of the Sun Maid Raisin Growers of California who are applying for the registration of the word "Puffed" as a trade-mark. They propose to use this word in connection with the sale of food products, particularly raisins, prunes, and figs. This word seems

to be a descriptive word in such sense that it could not be adopted as a trade-mark under the rules and regulations adopted by the courts in the interpretation of trade-mark statutes. We think it comes directly within the ruling made by this office to you on July 13, 1920. Biennial Report, 1918-20, page 74. See also L. R. A. 1918-A, pages 966 et seq.

FOREIGN CORPORATION—DOING BUSINESS

July 8, 1925.

We return herewith the letter of Mr. Daniel W. Troy. The foreign corporation which he describes must domesticate in North Carolina under our statute in order to do the business which he describes. That business is to induce one local merchant to buy a particular class of goods from another, and so is a domestic business.

CORPORATION—DECREASE OF STOCK

August 15, 1925.

In re Crystal Candy Company

We have considered the letter of Messrs. Ratcliff, Hudson & Ferrell, Attorneys-at-Law, in relation to the dealing of the above company with its outstanding preferred stock. It seems from the certificate of this company in relation to the retirement of this stock that the company itself has obtained possession of all the outstanding preferred stock in some way, either by purchase or by agreement with the preferred stockholders. Section 1161 of the Consolidated Statutes of 1919 permits the decrease of the capital stock by retiring or reducing any class of stock. The charter of this corporation as amended permitted it to issue one thousand shares of preferred stock of the par value of \$100 each. It also permitted the corporation at any dividend period to retire this stock at \$105. We have always regarded Section 1161 as furnishing the rule by which a corporation could deal with its outstanding stock without having to resort to Section 1131 to amend its charter. The charter of the corporation fixes the limit beyond which it cannot go in issuing its stock. If the corporation desires to extend this limit or to decrease it, then it has to resort to Section 1131, but where it intends to maintain its authority as contained in its original charter but wishes to decrease its capital stock for business purposes without impairing its authority as contained in its charter, then it can resort to Section 1161. This, however, is a matter to be determined by its stockholders and the only limit upon their power is that contained in the concluding clause of Section 1161—that is, that this decrease must not be made in such way as to impair the security of its creditors. The requirement of the advertisement as contained in that clause is for the benefit of the creditors.

As we understand the law, then, it is only when the corporation desires to amend its charter under Section 1131 that it has to file its certificate in

your office. Where, however, it deals with the management of the corporation itself and those questions that arise in the exercise of the authority conferred upon it by its charter, it resorts to Section 1161. That section must be strictly complied with, in order to relieve holders of stock of liability to creditors when that stock has been retired under that section. Indeed, it has been held that even without the advertisement required by the section, the owner of stock fully paid up would be relieved of this liability to creditors without a strict compliance with the act. Of course, this rule could not apply to such corporations which under the law have imposed upon their stockholders a double liability.

We see no reason, therefore, why this corporation could not proceed under Section 1161 and thus retire its outstanding preferred stock without the necessity for filing a certificate in your office or amending their charter as originally granted to it.

CORPORATION—NAME

August 17, 1925.

In the matter of the certificate of Purity Products Company

Section 1 of this certificate is as follows: "The name of this corporation is PURITY PRODUCTS COMPANY; but the contraction 'PURITY COMPANY' shall be considered to be a sufficient expression and signature of said name for all purposes."

Your criticism of this section it seems to us is well founded. The statute, C. S. 1114, evidently does not contemplate a double barrel name. No doubt in common use most corporations have aliases, but for all legal purposes the name in the certificate of incorporation must be a single and definite name so as to identify the corporation for all the purposes of its organization.

ENTRIES AND GRANTS

September 3, 1925.

We have examined the entry of Mrs. Sarah A. Lewis, together with the plat accompanying it, and have come to the conclusion that it is void upon its face. It is only when it is so void that your office can refuse to issue a grant. If there are mere irregularities in the proceedings, however vital those irregularities may be, you have no right to refuse to issue the grant on account of those irregularities. *Wool v. Saunders*, 108 N. C., 730. The original grant of this land was made to John M. Morehead and W. L. Arendell, and the effect of this grant is discussed very fully in *Land Company v. Hotel*, 132 N. C., 517. Under the grant to Morehead and Arendell, if Mrs. Lewis owns the riparian lot fronting upon this particular lot which she has entered, she has a right to build a wharf upon it without the entry. If she does not own the lot immediately fronting upon the survey, she cannot

enter the land proposed to be granted, it being covered by navigable water, except in the manner and form as provided in section 7543 of the Consolidated Statutes.

CORPORATION—NAME

September 11, 1925.

In reply to yours of even date. The Trustees of the General Assembly of the Presbyterian Church of the United States propose to amend its charter so that its name will read: "The Trustees of the General Assembly of the Presbyterian Church in the United States and the Presbyterian Foundation." In order that the law may be complied with it is necessary to add at the end of this name "Incorporated." C. S. Section 1114, sub-section 1.

CORPORATION—BANK

October 20, 1925.

We agree with you that section 224(c), III C. S. in direct terms prohibits the use of the word "bank" as a part of the name of any corporation except those reporting to the North Carolina Corporation Commission and under its supervision. If this corporation is organized for the purpose of building banks, it would not probably come within the evil which section 224(c) was intended to remedy, but it is very easy to strike the name out and avoid any difficulty arising from this statute.

TRADEMARK—DESCRIPTIVE TERM

January 12, 1926.

In the matter of Faucette's Trade-mark

That no one can take out an exclusive trade-mark in merely descriptive words is well established. "Orinoco" as a term descriptive of tobacco and tobacco seed has been used for many years. It is a well-known quality of such seed. Mr. Faucette, however, can register "Faucette's Special" as a trade-mark in its application to tobacco seed. We do not think that he is entitled to an exclusive trade-mark in the term "Gold Leaf Orinoco."

FOREIGN CORPORATION—DOMESTICATION

March 4, 1926.

In the matter of the Richmond Credit Interchange and Adjustment Bureau, Inc.

After consideration, as I recall we determined the other day that companies such as this cannot under existing machinery be incorporated in North Carolina. This being true, we think the same rule will apply to a

company legally and properly incorporated under the laws of another state but which could not be incorporated here, yet applies for permission to do business in the State. We think the same rule, generally speaking, should be applied to foreign corporations, particularly with relation to their organization.

AMERICAN WAR MOTHERS

March 27, 1926.

The American War Mothers were incorporated by an act of Congress of February 24, 1925, and the act contains the section quoted by Mrs. McCluer in her letter to you of February 20. It is a non-profit, social, civil and patriotic association and the act of Congress exempts it from all taxes of the Federal Government or any of its dependencies. We think you should, therefore, accept the filing by the American War Mothers of the name of Mrs. McCourtney as process agent of this State. We think there are no fees or taxes incident to this filing.

CORPORATION—DELINQUENT TWO YEARS

April 12, 1926.

In the matter of Madison Light and Power Company

The certificate of the Commissioner of Revenue that this company had complied with all requirements of the act and paid all State taxes, fees or penalties due upon it was not filed within the two years required by the statute, section 89, sub-section 18 of the Revenue Act of 1925. We have no legal authority to extend the period of two years and consequently, we think this charter's forfeiture has not been abrogated in any way under the circumstances.

CORPORATION—MUTUAL

May 8, 1926.

The effect of the amendment of C. S. 5243 by Chapter 179, Public Laws of 1925, is to create a prohibition against the use of the term "mutual" by any corporation or association thereafter organized for doing business for profit in this State. The General Assembly, however, could not in the light of existing facts have intended this statute to be taken literally. According to the course of business, there are a number of companies, such as insurance companies, which are required to use the term "mutual" in their certificate of incorporation if they are mutual companies. We think, therefore, that the above act should be confined only to the class of businesses described in the Consolidated Statutes as amended by Chapter 179.

CORPORATION—INCREASE OF STOCK—FEES

May 28, 1926.

In your letter of May 27 you present the following facts upon which you request a ruling of this office:

Yadkin River Power Company, a North Carolina corporation, filed an amendment to its charter May 21, 1924. That amendment increased its authorized capital stock from 60,000 shares to 270,000 shares. It changed the shares of stock from par value of \$100 each to shares of stock without par value.

It is manifest from this recitation that the actual increase of the shares of this corporation was 210,000 shares. Sub-section 2 of section 1218 of the Consolidated Statutes provides a tax for this increase of capital stock of forty cents for each one thousand dollars of the total increase authorized, but in no case less than \$40. Your office applied this Statute to the increase in the instant case and imposed a tax of \$8,400 upon the corporation involved, and this sum was paid. It now claims a refund from your office on the ground that the certificate of amendment filed with you provided for an exchange of the common stock outstanding with a par value of \$100 on a basis of four shares without par value, then to be issued, for each share of common stock outstanding with par value of \$100. At the time the amendment was filed the corporation certified that there were 38,850 shares of common stock and 17,088 shares of preferred stock issued and outstanding. Upon these facts you present two questions:

(1) Was the tax of \$8,400 collected by you a legal tax under the circumstances?

(2) If not legal, have you now authority to refund to the corporation the excess collected by you without authority by law?

As we have come to the conclusion that the original imposition of this tax was legal and valid under this statute, the answer to the first question, of course, will answer the second.

It is observable that the standard upon which the tax for this increase is fixed is the increase of capital stock authorized. It is not the increase that may be issued and outstanding at any period of the corporation's existence, but it is the total amount authorized.

Section 5 of Chapter 116, Public Laws of 1921, Section 1167(e) of the 3d volume of the Consolidated Statutes, declares "The tax upon a certificate of incorporation or existence or renewal of corporate existence or increase of capital stock without nominal or par value shall be the same as if each share of stock had a par or face value of \$100."

This statute, of course, is applicable to an increase of capital stock in the instant case. Your original calculation, then, was based upon the statute and you could not have done otherwise than you have done. At one time this office expressed a doubt to you upon the validity of fixing an arbitrary value of \$100 upon non-par stock in estimating the amount of the corporation's organization tax. That doubt has been completely removed by a recent decision of the Supreme Court of the United States, *Roberts & Schaefer Co. v. Emerson*, 46 Su. Ct. Rep. p. 375. That case holds distinctly that the State has the constitutional right to make the total authorized

capital stock the basis for the calculation of organization tax. It is further held that the fixing of the value of such non-par stock at \$100 in determining the amount of its organization tax was also valid legislation by the State.

It is very clear that the certificate of amendment cannot at all modify or impair the meaning of the statute itself which speaks in clear and unmistakable terms.

CORPORATION—INSURANCE—ENTITLED

July 9, 1926.

Where the title taken by a corporation at the time of its organization tends to indicate that it is doing an insurance business, it cannot be incorporated under Chapter 22. If, however, it is doing an insurance agency business, such as the title suggested by you, "Washington Insurance and Realty Company," we know of no reason why they should not be permitted to retain the word "insurance" in the name of the corporation. In the connection in which it is used, it seems to mean only that they are doing an insurance agency business.

OPINIONS TO THE STATE AUDITOR

APPROPRIATION ACT—WHEN EFFECTIVE

March 24, 1925.

You propound this question to this office:

Do the repealing clauses in the appropriation act of 1925 become effective on March 10, 1925, the day the bill was ratified, or on June 30, 1925, close of the fiscal year?

It is evident from an inspection of the appropriation bill that the General Assembly intended to repeal all appropriations theretofore made to any department, institution or agency of the State and to include in that act appropriations for all purposes connected with the State Government for the fiscal years beginning July 1, 1926, and July 1, 1927, when such appropriations would be available. It could not have intended, in doing this, to repeal immediately upon the ratification of the act all appropriations theretofore made for the State Government or its agencies. If this is to be the effect of the act, then the wheels of government would stop completely, because there would be no authority to pay out any money for its support if these various acts purporting to be repealed in the appropriation act of 1925 should be repealed immediately upon ratification of that act. It has been, indeed, throughout the history of the State a fixed rule that appropriations made at each biennial session of the Legislature should not be available until the beginning of the new fiscal year.

COUNTY AUDIT

May 4, 1925.

We have received your letter of May 2, enclosing letter from R. C. Birmingham & Company, accountants engaged in making an audit in Haywood County. The questions propounded by Birmingham & Company to you are as follows, with the answer appended:

(1) Has the county treasurer authority to disburse money on an order drawn by persons other than the register of deeds or lawful deputies acting for the board of county commissioners?

We find nothing in the statutes which regulates this particular act of the board of county commissioners so as to require all county warrants before they can be honored by the treasurer, to be signed by the register of deeds. The register of deeds is clerk of the board and his authority to sign such warrants is derived from that of the board of county commissioners to issue those warrants. The principal question here is, has the account upon which the warrant is based been audited by the board of county commissioners and by them directed to be paid? If it has been, then the duty to issue the warrant is, of course, imposed upon the register of deeds as clerk of the board. If the register of deeds authorizes any other person in his

presence to sign the warrant after it has been directed to be issued by the board, that would be a legal warrant, though such practice is a serious irregularity.

(2) Where the salary of the treasurer is specified by law, has he the right to accept additional compensation for handling any county bond issue?

If the accountant doing the auditing means to present to this office the question whether the board of county commissioners has authority to grant the treasurer additional compensation, then it is very clear that it has not such authority. The salary of the treasurer of Haywood County is fixed by Chapter 394, Public-Local Laws, 1923, as follows:

Sec. 5. On and after the first Monday in December, one thousand nine hundred and twenty-four, the county commissioners of Haywood County are hereby authorized and directed, in their settlements with the treasurer of said county, to allow him (or her) the sum of two thousand dollars per annum, payable in equal monthly installments, which sum shall constitute his (or her) full compensation for receiving and disbursing the funds of Haywood County of all descriptions from whatever source derived and for the performance of any other duties that the board may require of said treasurer. The salary hereby authorized shall be pro-rated among the different funds for which levies are made and accounts kept.

It is very clear from this that the board of county commissioners cannot increase the compensation of the county treasurer for any duties performed by him of whatsoever character or nature.

The difficulty arising from these letters sent by these accountants to you is that they are not definite enough in regard to the statutes relied upon for such payments. To fail to refer to them imposes upon this office unnecessary and burdensome work. The old act relating to the compensation of the treasurer of Haywood County is Chapter 557, Public-Local Laws of 1919. The standard there fixed for his compensation is that which he derived from commissions for the fiscal year ending the first Monday in December, 1918. From the wording of the act it is apparent that that cannot be exceeded.

SALARY AND WAGE COMMISSION—PAY OF EMPLOYEES

May 15, 1925.

In the matter of the pay of the clerical assistance of the Salary and Wage Commission

The concluding clause of section 1 of the act to provide a salary and wage commission is as follows:

Clerical assistance shall be paid out of the emergency contingent fund of the general appropriation bill upon approval of the budget bureau.

As this act contemplates the functioning of this commission on or about April 1, 1925, and as the emergency contingent fund which is provided for in the appropriation act of 1925 is not available until the first day of

July, 1925, we found it necessary soon after the enactment of the Salary and Wage Commission to investigate how and when the clerical assistance of this commission could be compensated for their services rendered before the emergency contingent fund was available.

Our conclusion then (and it is still our conclusion) was that resort must be had to section 3861(d) of the third volume of the Consolidated Statutes, which is as follows:

Employment of additional assistants; compensation. The Governor and Council of State are authorized and empowered to employ any additional clerical or stenographic help, in any of the departments of the State, upon the written request of the head of said department, and when they shall become satisfied that such additional help is needed, temporarily in such department, to do efficiently the work of said department, and fix the salary of such additional help under section 3861(c).

This section is invoked as a temporary expedient until the specific fund from which it is to be paid is available. We think that the Governor and Council of State should enter upon its minutes the authority of Mr. Rogers to employ the help necessary for the salary and wage commission to function, and direct the Auditor to pay such salary upon the certificate of Mr. Rogers that the particular employee has been engaged for the purposes of the act. Of course, as seen by the above quoted section, the salary of these employees cannot exceed \$1,800 per annum each.

PRIVATE SECRETARY—FEES

June 9, 1925.

In the matter of the fifty cent fee retained by the Private Secretary to the Governor

In order that you may understand clearly the position of this office, I give a brief synopsis of the history of the compensation of the Private Secretary to the Governor. For the first time in Chapter 405, Private Laws of 1901, he was allowed to retain fifty cents on each commission issued as part of his compensation. Chapter 830, Public Laws of 1907, repealed all of these, fixing the salary of the Private Secretary at \$2,000 per annum and no more. This salary was increased from time to time, each of the acts so increasing it fixing a definite round sum for his compensation and stating that it should be no more: Chapter 95, Public Laws, 1911; Chapter 1, Public Laws, 1913; Chapter 50, Public Laws, 1915; Chapter 214, Public Laws, 1917. The above chapter, Laws of 1907, in Section 1 included this provision:

No employee named herein shall receive any compensation by way of fees or special appropriations or from any departmental fund except as hereinafter provided.

Until, then, the enactment of the Consolidated Statutes of 1919 the Private Secretary to the Governor was not entitled to retain this fifty cents. The act of 1907 was brought forward in the Consolidated Statutes as

Section 3850. The conclusion of that section in specific terms modifies materially the conclusion of Section 1 of the act of 1907, as follows:

No officer or employee of the State shall receive any compensation other than the salaries fixed in this chapter, except as provided by fees or by special appropriations or from any departmental fund.

This, as is readily perceived, entirely changes the meaning of the law as contained in the act of 1907. As you know, the Consolidated Statutes of 1919 were introduced into the General Assembly of 1919 as a bill. It was enacted as a law by being put upon its several readings in each house in accordance with the provisions of Section 14 of Article 2 of the Constitution. It became, then, a distinct enactment of the General Assembly and was intended to repeal all public and general statutes not contained therein (Section 8101) and was declared to be in force from and after August 1, 1919 (Section 8107).

The exception, then, to C. S. Section 3850 must be interpreted in connection with the provisions contained in that chapter, 71, which deals with salaries and fees of State and county officers and employees. Section 3859 provides the compensation of the Private Secretary. It first states that he shall be allowed an annual salary of \$2,500 and then requires him to charge and collect certain fees which are to be paid by the persons for whom the services are rendered. Among these fees are \$2.50 each for all commissions issued by the Governor's office. Then comes this declaration, which is the point in the discussion:

All fees, except fifty cents on each commission issued, which shall be retained by the Private Secretary for his services, received by him shall be paid into the Treasury quarterly.

Here, then, is a distinct and unequivocal declaration by the Legislature that he shall be entitled to this fifty cents. There is no room for construction or interpretation of the statute. It speaks in clear and unmistakable terms as to this matter. It makes no difference, then, what may have been the law before August 1, 1919. What has been the law since is the question involved?

Has there, then, been any modification of this statute in relation to the compensation of the Private Secretary to the Governor since August 1, 1919? Chapter 227, Public Laws of 1921, amends C. S. Section 3859 by striking out in line 2 and in line 3 thereof the words "twenty-five hundred" and in inserting in lieu thereof the words "three thousand." It is entirely clear that the only effect of this act is to leave Section 3859 as it was with "three thousand" substituted for "twenty-five hundred." The General Assembly of 1925 interpreted this amendment in the way herein set out by including Section 3859 in the Third Volume of the Consolidated Statutes in identical terms as it had been in the Consolidated Statutes of 1919 with the exception that \$3,000 is fixed as the annual salary in place of the \$2,500 of the former statute. It thus declared (for the Third Volume of the Consolidated Statutes was enacted as a law at the session of 1925) that all fees, except fifty cents

on each commission issued, which shall be retained by the Private Secretary for his services, received by the Private Secretary shall be paid into the Treasury quarterly.

It is suggested, however, that Section 91 of the Revenue Act of 1925 may have some effect upon the legal aspect of the salary act as above set out. Not at all, as we understand the law. That section levies a tax of \$2.50 upon the affixing of the Great Seal of the State on any commission and allows the officer affixing said Great Seal and collecting this tax to retain 5 per cent of the amount so collected. The statute there, however, is dealing with the tax levied by the State. The fees collected by the Private Secretary under Section 3859 are an entirely different proposition—they are the cost of the services; the other is distinctly a tax. The only effect of Section 91 of the Revenue Act, then, would be to allow the Private Secretary to retain the 5 per cent commission on collection of this seal tax, in addition to this other salary and commission.

GENERAL FUND NOTE ACT

June 18, 1925.

We return herewith copy of the minutes of the Council of State of the meeting on June 8, 1925. This office has approved heretofore of the disposition made by the Council of State of the indebtedness of the State described in the minutes as "first" and "fourth." Those described in the minutes as "second" and "third" have not heretofore been presented to this office. As the Council of State has directed that these two should also be provided for out of the general fund note act, with proper information before them, we also approve this disposition made of them by the Council of State.

PENSION—WIDOW'S PENSION

October 23, 1925.

You propound this question to us in your letter of October 23d:

If a Confederate Soldier pensioner dies after the 15th of September or after the 15th of April, can you pay the widow the Soldier's pension, or shall you recall the Soldier's check and pay her the amount of the widow's pension?

You state in your letter that the widow's pension under the Appropriation Act of 1925 will be about \$100 a year, whereas, that of Confederate Soldiers of the fourth class will be about \$150, III, C. S. 5168 (s) and 5168 (t) clearly, we think, contemplate this:

If a pensioner dies after the 15th of September, say before the December pension check is delivered to him, it is declared lawful for the clerk of the Superior Court of the county in which the deceased pensioner lived to deliver the pension check due in December to the widow or next of kin of such pensioner. Manifestly, this check goes to the widow or next of kin, not because they are directly pensioners of the Government, but as part of the estate of

the deceased Confederate Soldier. As you know, some widows cannot qualify as Confederate pensioners after the death of their husband on account of the marriage having occurred since the period fixed by the statute. This pension check, then, goes to the widow independent of her being entitled to a pension herself. On the death of her husband, however, she continues to take his pension for a period of one year, it makes no difference whether the marriage occurred after the first day of January, 1898, or since, as to this particular payment. She takes it as widow of the deceased pensioner and gets his pension provided the amount does not exceed a widow's pension as prescribed by law. In other words, a widow situated with reference to the deceased pensioner as above described cannot on your assumption that widow pensioners are entitled to \$100, receive more than \$100 for the year succeeding her husband's death. If her husband, then, previous to his death was drawing \$150, she is allowed only \$100.

If, therefore, she received check for December, her husband dying after September 15th, that is to be included in the \$100 which she is to receive as widow of the deceased pensioner. This seems to be the effect of the law.

JUDGE—EMERGENCY—COMPENSATION

December 18, 1925.

It seems that the Honorable Walter D. Siler was commissioned by the Governor of the State as Emergency Judge under Chapter 216 of the Public Laws of 1925 to hold a one week civil term for the Catawba County Superior Court. On Wednesday of that one week's term the Court entered upon the trial of a civil case. Such was the character of that case that it was necessary, in order to complete its hearing, to continue the Court over until Wednesday of the following week.

Upon this you ask the opinion of this office as to whether or not Mr. Siler is entitled to two weeks' pay under Chapter 216, Public Laws of 1925. Though the question is not free from doubt, we think he is, for the following reasons: Section 3 of Chapter 216 declares:

That such emergency judges, during the time noted in the commission evidencing his appointment, shall have all the jurisdiction which is now or may be hereafter lawfully exercised by the presiding and resident judge of a district in which the court, or courts, to be held by such emergency judge shall have, etc.

Section 4637 of the Consolidated Statutes was enacted specifically for the purpose of enabling Superior Court judges to continue terms for the trial of cases until the trial of such case is completed. That section is as follows:

In case the term of a court shall expire while a trial for felony shall be in progress, and before judgment shall be given therein, the judge shall continue the term as long as in his opinion it shall be necessary for the purposes of the case; and he may in his discretion exercise the same power in the trial of any other cause under the same circumstances, except civil actions begun after Thursday of the last week.

Section 5 of Chapter 216 makes the compensation of an Emergency Judge for each week or fractional part thereof, \$150 and his actual expenses, including his traveling expenses to and from his home.

Though the commission of the Judge may direct the Emergency Judge to hold a one week's term, then, yet as soon as he is thus commissioned, he has all the authority under Section 3 necessary for him to continue the term for the hearing of a particular case under Section 4637. This power and authority is incident to his appointment as Emergency Judge.

Consequently, Mr. Siler is entitled to the additional \$150 and his actual expenses.

LICENSE TAX—COUNTIES

May 5, 1926.

You verbally request an opinion of this office as to whether or not each county is compelled to levy a license tax in the same amount as that levied by the State on persons selling pianos or organs under Section 74 of the Revenue Act of 1925. Section 101 of the Revenue Act is as follows:

In cases where a specific license tax is levied for the privilege of carrying on any business, trade or profession, the county may levy the same tax and no more, provided, no provisions to the contrary are made in the section levying the specific license tax.

Now, there is no provision to the contrary in section 74 in relation to this particular license tax. Agents, however, holding the \$10 duplicate license of section 74 may be taxed by the county only to the amount of \$5 per annum.

It is noticeable that section 101 is permissive in the sense that the board of commissioners may or may not levy the particular license tax, as they determine. In other words, the levying of such tax is left to the board of commissioners and in this instance, as in all instances, there must be a levy by the board before such tax can be collectible.

JUDGE—REGULAR TERM—COMPENSATION

June 29, 1926.

In your letter of June 28th you ask my opinion as to whether a judge assigned to hold a regular term of court out of his district would be entitled to extra compensation as provided by C. S. 1451.

That section provides for the compensation of \$100 per week to a judge holding a *special* term of court. And again, C. S. 3884 in fixing the salaries of Superior Court judges provides for extra compensation for special terms of court only. I find no provision for any extra compensation where a judge holds a regular term outside of his district by the appointment of the Governor. I, therefore, advise that payment of such extra compensation is limited to those cases where the judge holds a special term of court.

OPINIONS TO THE STATE TREASURER

TORRENS ACT—GUARANTEE FUND

October 27, 1924.

I cannot advise you to pay out any of the guaranty fund or any other funds unappropriated in the Treasury of the State upon the demand of B. F. Pickles, Trustee, for a defect in the title Torrenized, in that the examiner failed to report an encumbrance upon the property of A. H. Stephens. The statute provides that a suit shall be brought against you in the county in which the land is situate, and I am writing Mr. Brinson that we must insist upon the suit being brought, and we will contest in that suit the right to claim against the guaranty fund.

VALIDITY—CHAPTER 87 P. L. 1911

February 17, 1925.

According to your request of February 17th, we have investigated the validity of the \$60,000 bond issue authorized in 1911 to establish the N. C. School for the Feeble Minded, Chapter 87, Public Laws of 1911, and have come to the conclusion that such bonds are valid obligations of the State. The legislative history of the bill is as follows:

Senator Cartwright introduced it in the Senate on January 31, 1911. It passed its first reading and was referred to the committee on insane asylums, S. J., p. 149. On February 3, 1911, on motion of Senator Johnson, the bill was re-referred to the committee on appropriations and five hundred copies were ordered printed, S. J., p. 169, after the bill had been reported favorably by the committee on insane asylums, S. J., p. 171. On February 22, 1911, the bill was reported favorably by the appropriations committee, S. J., p. 383, as amended. That amendment was to include in the bill section 3½ as follows:

The State Superintendent of Public Instruction shall be ex officio president of the board of trustees.

On February 24, 1911, the bill passed its second reading upon roll call, ays 47 (naming them), nos none, S. J., p. 467. On February 25, 1911, it passed its third reading, ays 29 (naming them), nos 19 (naming them), and thereupon it was ordered sent to the House of Representatives. On Tuesday, February 28, 1911, a message from the Senate was received, the bill was put upon its first reading and referred to the committee on appropriations, H. J., p. 784. On Thursday, March 2, 1911, there was a favorable report from the appropriations committee, but it was accompanied by an amendment, H. J., p. 875. That amendment was as follows: That the

bill as it passed the Senate authorized a bond issue of \$100,000. The committee on appropriations in the House reduced the amount to \$60,000. At the night session the same day it passed its second reading, 78 voting in the affirmative (naming them), and 18 in the negative (naming them), H. J., p. 919. On March 3, 1911, it passed its third reading, 76 ays (naming them), and 19 nos (naming them), and was sent to the Senate for concurrence in the House amendment. On March 3, 1911, the Senate concurred in the amendment and the bill was ordered enrolled, S. J., p. 665. On March 4, 1911, it was reported in the Senate properly enrolled and sent to the office of the Secretary of State, S. J., p. 705. The same report was made in the House on the same day, March 4, 1911, H. J., p. 996.

It is clear, we think, that the amendment made in the Senate was immaterial under the rulings of our Supreme Court and did not require the bill to be put upon the necessary roll calls after the amendment. It is equally clear that the amendment made by the appropriations committee of the House did not require roll calls after the amendment was made because it reduced the amount of bonds to be issued from \$100,000 to \$60,000.

STATE DEPOSITS—PREFERRED CLAIM

February 24, 1925.

We have received your letter of February 23d, enclosing a letter from Mr. Floyd G. Whitney, Manager of the Fidelity and Deposit Company of Maryland, at Charlotte, N. C. We have been unable to find, and know of no statute in North Carolina which makes a deposit made by the State in a bank a preferred claim against that bank in case of insolvency. All taxes due the State are, of course, preferred claims under C. S. Section 1220 and also in bankruptcy courts. Section 64, subsection (a) of the Bankruptcy Act. If we were to prepare for you and you were to file a claim with the Receiver of the Citizens Bank and Trust Company of Wilmington, N. C., claiming a preference against the assets of that insolvent bank by reason of the fact that the State had a deposit in that bank, it would be an utterly vain thing.

TAXATION—MOTOR VEHICLES—USED CARS

March 27, 1925.

In re Rawls Auto Parts Wrecking Company

I understand that Judge Manning passed on the complaint of this concern and held that this party was liable for the tax. However, at your request I have examined the file on the subject with a view to advising you as to whether there should be a refund of the \$120 paid to Mr. Gates.

The tax collected was for the years 1921-22 and 1922-23. Mr. Cates ascertained that no manufacturer's license tax for the Stephens car was paid for the year 1921-22, and that for the year 1922-23 the manufacturer's license

tax was paid by the Stephens Manufacturing Company but no duplicate issued or authorized for this concern. If the manufacturer's license tax had been paid by this concern or by another an agent's license issued to the Rawls Company, it would have had the right under such license to sell without further tax used cars taken in exchange for Stephens cars sold by it. Under such license it would not have had the right to buy, sell or exchange used cars other than those so taken by it in trades for the new cars it was authorized to sell. From the facts stated, then, it appears that it held no license authorizing it to deal in used cars of any kind.

From its letter of November 10th, 1924, it appears that this concern did during the years named engage in the business of buying used cars. Section 72, Revenue Act, 1921, provides that "every independent or second-hand dealer engaged in the business of buying, selling or exchanging any make of automobiles in this State on which the manufacturer's license of \$500 has been paid, shall pay a license tax of \$50 per annum to the State Treasurer and obtain a license for conducting such business." The disposition afterwards made of used cars so purchased would not alter the fact that the concern engaged in the business of "buying" such cars.

As stated, Judge Manning has heretofore held that a concern operating as this was is liable for the \$50 tax. The Department of Revenue has accepted this construction of the law and has been operating under it, collecting such taxes from other persons or concerns conducting a business similar to the one of the Rawls Company.

I would not feel free to reverse the ruling made by Judge Manning and thus interfere with the practice of the Department of Revenue with respect to this tax. I may add also that I think the construction placed upon the section by Judge Manning is the correct one and that the tax was properly imposed and collected.

STATE BONDS—REGISTRATION

April 8, 1925.

*In re Huguette Marcelle Clark Trust—Assignment of registered Bonds
of this trust*

We have examined carefully the papers sent to you by the Guaranty Trust Company of New York in relation to the assignment of certain registered bonds of the State of North Carolina belonging to the above Trust. This assignment is rendered necessary by the substitution of other trustees in the place of those in whose names the bonds were originally registered. The statute requires that the written assignment of such bonds must be acknowledged in the form satisfactory to the State Treasurer. Section 7405, 3d Volume, C. S., 1924.

This office has always advised you that the signatures to such assignment should be acknowledged before a notary public and the assignment probated by him in the usual form. The assignments in the instant case are not so acknowledged and proven. When this is done, we think they will be in proper form. What is stamped on the face of these assignments, to wit:

Signatures guaranteed by Guaranty Trust Company of New York.

is not sufficient to abrogate the requirements that the signatures should be acknowledged and proven before a notary public with a seal. Otherwise, we think the papers are in proper form for entry of the assignments.

LAKE WACCAMAW—APPROPRIATION

May 11, 1925.

In reply to yours of May 8th. You ask the opinion of this office upon an apparent conflict between H. B. 651, S. B. 1363, entitled "An Act to authorize the appropriation of three thousand dollars to the construction of a dam at Lake Waccamaw, Columbus County," and the general appropriation bill. The former was ratified March 7, 1925, and the latter March 10, 1925. Section 10 of the appropriation act declares that "All laws and clauses of laws in conflict with this act, including such as cover the subject matter of the provisions of this act which are not included herein, are hereby repealed."

There are two general principles which are applicable to this situation that we think solve the problem. The first is, the acts of the Legislature dealing with the same general subject, especially when enacted at the same session of the Legislature, must be construed together so that both may stand, if possible, because repeals by implication are not favored. The second is that legislation in general terms does not repeal an act dealing with a special subject unless the repeal is positive and direct or by necessary inference, because it is assumed that the mind of the Legislature was directed to the special subject at the time that it enacted the latter, and, therefore, intended that it should be an exception to the general rule established by the general law, even though the general law was enacted a few days after the special act. We do not think that the repealing clause in the general appropriation bill had the necessary effect of repealing this special appropriation; consequently, it may stand, notwithstanding such repealing clause.

You also ask our interpretation of section 2 of the Lake Waccamaw act upon the terms used therein as to when you are authorized to pay out the \$3,000. Section 2 is as follows:

The Treasurer is hereby authorized to pay out of the general fund of the State, not otherwise appropriated, the sum of three thousand dollars (\$3,000) to the County Commissioners of Columbus County to be used in the construction of said dam and spillway as allowed by the act of Congress, upon assurance that the citizens of Columbus County are prepared to pay the balance of the cost of the construction which shall be not less than three thousand dollars (\$3,000).

We think you could not be sure that the citizens of Columbus County are prepared to pay the balance of the cost of the construction, which shall not be less than \$3,000, until said sum of \$3,000 is actually raised and is available for the purposes of the act.

You will observe that you are authorized to pay out of the general fund of the State "*not otherwise appropriated.*" We interpret the latter clause as subordinating the appropriation of the act to general appropriations, that is, unless you have adequate funds to meet these general appropriations and leave a balance to be applied to the purpose of the act, then we think this appropriation is not available.

LAKE WACCAMAW—APPROPRIATION

May 21, 1925.

In re Lake Waccamaw Appropriation

The act of the recent session of the Legislature making an appropriation of \$3,000 by the State for the purpose of erecting a dam at Lake Waccamaw makes this appropriation available only when you are assured that the citizens of Columbus County are prepared to pay the balance of the cost of the construction, which shall not be less than \$3,000. On May 11th we wrote you:

We think you could not be sure that the citizens of Columbus County are prepared to pay the balance of the cost of construction, which shall not be less than \$3,000, until the said sum of \$3,000 is actually raised and is available for the purposes of the act.

In other words, this fund should be not only promised, but actually collected and deposited in a solvent bank for the purpose of completing this dam. Of course, this deposit so made must be a special deposit and protected by a depositary bond. When this amount, then, has been so collected and so deposited in a bank with adequate security from the bank, a certificate from the bank to you that this fund was in it subject to check for the purposes of the work would, we think, justify you in meeting this sum by the State appropriation. A certificate in this or similar form from the bank would answer:

The Bank of _____, located at _____, hereby certifies to the State Treasurer that there has been deposited in it a special fund of \$3,000 by the citizens of Columbus County and that the same is adequately secured by a depositary bond and is subject to be checked against to aid in the construction of the dam at Lake Waccamaw in Columbus County. This _____ day of _____, 1925.

President
Cashier

(Seal)

North Carolina—Columbus County.

I, _____, notary public in and for said County, do hereby certify that _____, President of Bank of _____, and _____, Cashier of Bank of _____, personally appeared before me this day and acknowledged the due execution of the foregoing certificate. Witness my hand and notarial seal, this _____ day of _____, 1925.

INSURANCE COMPANIES—REGISTRATION—ACT OF 1925

May 27, 1925.

We have considered the two acts of the recent General Assembly in regard to the registration of certain bonds before they shall be deposited with you by insurance companies. Both of them were ratified on March 6, 1925. The first is the "Act for registration of securities deposited by insurance companies." The machinery used in this act for such registration is: (1) The Insurance Commissioner is empowered to cause bonds of any state, county, city or town which are payable to bearer to be registered at the proper place in the name of the State Treasurer with whom those bonds are to be deposited. This must be done with the written consent of the depositing insurance company. This written consent is secured by authority in the Insurance Commissioner to require these companies to file their written consent as a condition precedent to the right of making such deposit or the right to continue any such deposit heretofore made. (2) The act to provide for registration in the name of the owner of the bonds of the counties, cities, towns, school districts and school taxing districts. That act merely empowers these governmental agencies to register bonds issued by them and provides the machinery through which such registration is to be had. There is nothing compulsory in the act except as the consequence of any registering of the bonds may affect their value in the market. For instance, if the Insurance Commissioner, acting under the other law, requires bonds of this character to be registered before they shall remain on deposit or be deposited with the State Treasurer, these bonds must be substituted for other bonds so registered or they must be registered by the subordinate governmental agency which issued them before they can be accepted as such deposit. The registration act, then steps in and the insurance company may apply to the municipality issuing the bonds to have them registered under the authority of the act of 1925.

This, we think, is the substance of these two acts, and in the absence of specific queries upon them, we think this interpretation will enable both you and the Insurance Commissioner to act upon them.

STATE GENERAL FUND—SPECIAL FUND

June 18, 1925.

In re Using temporarily specific funds for general purposes

In reply to yours of June 17th.

We think you have no authority to use temporarily specific funds for general purposes. We have gone over carefully the statutes to which you refer in your letter. Before taking them up seriatim, however, we will answer other questions put by you in your letter. The first we have already answered. Second, we think the acts of 1925 do not repeal the Treasurer *ex officio* law. The only effect of the daily deposit act as appears by section 5 thereof is to require all funds of whatever nature or character to be deposited by the various State institutions in depositary banks selected by you daily. The notification to you of these deposits are to be accompanied

by distribution sheets which show, among other things, the sources from which the money is derived. One of the objects of this is, of course, to direct you as to which fund should be credited the amounts so deposited.

Land Title Registration Act, C. S. Section 2422. This is made by express provision of the statute a special fund for a particular purpose and so is to be kept as you have heretofore kept it.

Certain hospital funds, C. S. Section 6167. This continues a special fund.

Oil inspection fund, C. S. Section 4857. Other than surplus, this continues a special fund.

The fund belonging to the Apricultural Department as described in C. S. 4601 remains a special fund to be administered as therein provided.

Civil engineers and land surveyors. This remains a special fund and to be administered as such under C. S. (1924) Section 6055-h.

Just here we cannot refrain from the comment on this particular statute that it is legislation of a character not justified by the nature of the fund itself. The State Treasurer and State Auditor should have nothing to do with payment of money out of this fund, but it should be kept by the treasurer or secretary of the board and paid out by him. However, the act is otherwise and of course, has to be obeyed. It is otherwise with reference to any fund arising under the accountancy act of 1925. That is paid into the State Treasury only as a surplus remaining after compliance with the provisions of the act and goes into the general fund.

Proceeds of bond sales for specific purposes, as, for instance, for State highways and permanent improvements at schools and institutions. We follow in this your own statement. These are made specific funds directly by the acts of the Legislature dealing with them. See section 5 of the permanent improvement appropriation act of 1925. Being such they, of course, have to be kept on your books as special funds and can be used for no other purpose than that to which the Legislature has devoted them.

Sinking funds. These, of course, are specific funds which can be invested only in the manner set out in the statutes dealing with them. They cannot be diverted to any other purpose than that stated in the statute.

Laboratory of Hygiene, C. S. Section 7059. The tax here is an inspection tax and though required to be deposited in the State Treasury daily, any funds derived from it constitute a special fund for the benefit of the Laboratory of Hygiene. This ruling would apply to any special funds collected by the State Board of Health if those funds are appropriated by the particular act to the use of the State Board of Health. The earnings of the various institutions, educational and charitable, are reported to you under section 5 of the daily deposit act and are to be credited to the particular institution reporting such earnings as part of the fund available for its use. As we understand this situation, all these earnings as far as they can be forecast are brought to the attention of the appropriation committee at the time that the appropriations are made. Therefore, that committee in fixing the appropriation for a particular institution or department does so with reference to probable earnings by such institution or department—that is, the appropriation is not made so large because the institution or department may depend upon these earnings as part of its support. We state this generally, to meet

a condition which may arise from some particular institution or department. It is not possible for us to be informed specifically as to such earnings.

It appears then that so far as the keeping of books in your office is concerned, this ruling will not affect your present method of keeping them.

STATE TREASURER—BOND—SINKING FUND

June 20, 1925.

It seems that there are something over \$400,000 of State highway bonds authorized to be issued under Chapter 2, Public Laws 1921, and Chapter 263, Public Laws 1923, remaining unsold. The sinking fund commission, created under the sinking fund commission act of 1925, wishes to invest in these bonds part of the sinking fund already accumulated for the benefit of that fund. The first question which you propound to this office upon this situation is this: Is it necessary to advertise the sale of these bonds in order that the sinking fund commission might legally purchase them?

Section 41 of Chapter 2, Public Laws 1921, as amended by Chapter 263, section 5, Public Laws 1923, is brought forward in the Consolidated Statutes of 1924 as section 3946(11). The following is included in this section:

Before selling the bonds herein authorized to be issued, the State Treasurer shall advertise the sale and invite sealed bids in such manner as in his judgment may seem most effectual to secure the best price.

The terms used in the clause thus quoted are mandatory and should be obeyed, certainly in all instances in which the title to a particular set of bonds might become thereafter involved in some controversy. If this was a simple transaction between the sinking fund commission, as part of the State government having charge of that fund, and the State Treasurer, this provision of the statute might well be disregarded, because the sinking fund commission is expressly authorized to purchase State bonds at the market price of those bonds, and the market price of the particular class of bonds here dealt with can be readily ascertained.

It may happen, however, that in the future on account of an increase in the value of this particular class of bonds, the sinking fund would be benefited by a sale of them with the proceeds to be invested in other securities. When that time comes, then, it is important, in order that the purchaser from the sinking fund commission may have an absolutely clear title to them and that the transaction should pass the scrutiny of a bond attorney, that the mandatory provision of the statute should be complied with in the first instance. Of course, a single advertisement in some local paper would comply with this mandatory provision, for in the same section the Treasurer is empowered to sell the bonds therein authorized in such manner as in his judgment will produce the best price. We advise, therefore, that the advertisement be placed in a local paper for one time and that thereafter the Treasurer proceed under the authority contained in the above cited section in the Consolidated Statutes of 1924.

We were requested also by you to pass upon the bond of the State Treasurer with reference to the custody of the sinking fund. The section of the act appropriate to the discussion is section 4 of the sinking fund commission act of 1925, which is as follows:

The State Treasurer shall be ex officio treasurer of the commission and the custodian of the sinking fund and the investments thereof. He and the sureties upon his official bond as State Treasurer shall be liable for any breach of faithful performance of his duties under this act, as well as his duties as State Treasurer, and his official bond shall be made to comply with this requirement.

If the final clause of this section had not been added to the section, there would be no difficulty in the situation for the following reasons. The State Treasurer's bond under C. S. 7680 is conditioned that he shall faithfully execute the duties of his office. Now, Chapter 188, Public Laws 1923, had made the custody of the sinking fund provided for in that act one of the duties of the office of the State Treasurer. When he came later (in January, 1925) to execute a new bond for his new term then commencing, that bond would necessarily cover his duties as custodian of the sinking fund established before that time. So, it would not have been necessary to enter into any discussion as to whether, as against the bondsmen of a public official, the Legislature, after the execution of the bond, could increase the duties of the office. The last clause in said section, however, was added and "his official bond shall be made to comply with this requirement."

As we interpret this section of the sinking fund commission act, the official bond fixed in the penal sum of \$250,000 is to secure the faithful performance of his duties as treasurer of the sinking fund commission, as well as Treasurer of the State. These duties are imposed upon him by reason of the fact that he is State Treasurer. The first corollary from this is that the amount of penalty to the State Treasurer's bond, to wit: \$250,000, is not increased by the statute itself. This being true, there is no authority to increase this amount. Section 3 of the act confers upon the commission authority to fix the penal sum of another bond to be executed by the State Treasurer, it would be, in the opinion of this office, a mere voluntary bond not authorized by statute and could be enforced only as such voluntary bond. The last clause of section 4, as above stated, requires, however, that the bond of the Treasurer executed at the beginning of his present term should have (of course, with the consent of the surety company), a rider attached to it in the following or substantially similar form:

It is understood and agreed by the parties to this official bond that the penalty herein provided shall be security for the faithful performance of the duties of said State Treasurer as treasurer of the sinking fund, as well as Treasurer of the State, under the act of the General Assembly of 1925, ratified February 26, 1925, and entitled "the sinking fund commission act," in as full and ample a manner as though said bond had been originally written with this requirement in it.

MOTHERS' AID—APPROPRIATION—FISCAL YEAR

July 8, 1925.

It seems there was in the Treasury on July 1, 1925, a part of the fund appropriated by the General Assembly of 1923 for Mothers' Aid, this sum amounting to \$446.50. The State, however, before July 1st had incurred a liability to the counties interested for this amount under the Mothers' Aid Act, Chapter 260, Public Laws, 1923. Stated in broad, general terms, that act contemplates the advancement of the money in the first instance by the counties to the mothers coming within the category of those to whom the aid was to be appropriated. Section 8 of the act requires the treasurer of the county wherein aid has been granted to furnish an itemized statement in each case of amounts paid at the end of each fiscal quarter. When these amounts are approved by the State Board of Charities and Public Welfare, it shall certify the account to the State Treasurer, whereupon the State Treasurer shall immediately make out and forward to such county treasurer his voucher for one-half of the total amount certified as having actually been paid out by the county. Here, then, is an absolute liability assumed by the State for this particular amount. That amount cannot be ascertained with final definiteness until the end of the fiscal quarter—that is, until July 1st. When properly certified to you, then, it is a valid claim against this balance in the Treasury on July 1, 1925. In other words, it is essentially and necessarily a liability incurred by the State voluntarily for the benefit of the county and like any other ascertained indebtedness of the State, it should be paid and paid out of the particular fund devoted by the Legislature to that purpose.

STATE AUDIT—BUDGET ACT

July 25, 1925.

You ask what effect the Executive Budget Act of 1925 has upon Chap. 163 P. L., 1921. The latter act practically gives the State Auditor plenary control over the accounting of the various departments and institutions of the State. Section 26 of the Budget Act gives a large measure of the same control to the Director of the Budget. As far as this control extends the later act supersedes the former. One of the objects in the enactment section 26 was to avoid duplication and overlapping. The Director also is given full power and authority to determine whether a proper system of accounting exists in the various departments and if it does not exist to establish such proper system. This was one of the duties imposed upon the Auditor in sections 1 and 2 of the Act of 1921. This duty has been, no doubt, already done by the Auditor, so that the duty of the Director is, in the first instance, to determine whether these systems so adopted comply fully with the requirements of section 26. If, in his opinion, they do not, he manifestly has power to make them conform. If, however, the Auditor has not established in a particular department the system required in the Act of 1921, then his responsibility and authority in this particular case ceases, and the duty is transferred to the Director under Budget Act.

Section 4 of the Act of 1921 has in no particular been superseded by the Budget Act, so the Auditor still has authority to audit various institutions and departments from time to time, and perform the other duties imposed upon him in section 4.

Of course, the expression used in the statute, "from time to time," necessarily requires an appreciable interval of time between the audits. In no sense does it mean or allow a continuous audit.

STATE BONDS—TRANSFER

February, 20, 1926.

This morning you left with me certain papers relating to the transfer of a State bond for \$1,000, registered in the name of Mrs. Mary L. Jackson, to Mrs. Missouri M. J. Overman. The effect of the papers is to show that Mrs. M. M. J. Overman duly qualified as administratrix of her mother, Mrs. M. L. Jackson, on March 23, 1914. All of these papers are properly certified to by Mr. Sawyer, the Clerk of the Superior Court of Pasquotank County. Upon these papers you are justified in sending each installment of interest as it becomes due to Mrs. Overman as administratrix of her mother..

Accompanying these papers, however, is a letter of instruction from Mrs. Overman in which she directs you to transfer this bond to her individually. This direction is in the form of an ordinary letter; the signature is not acknowledged before a notary public or clerk of the court having a seal. In other words, there is no legal identification of her signature as that of the administratrix of Mrs. Jackson's estate. We do not think that she is entitled to have the bond registered in her own name even if this direction had been in proper form, until after she has filed a final account of her administration of the estate of her mother with the Clerk of the Superior Court of Pasquotank County, and that account has been approved by the Clerk and in addition thereto, shows that this \$1,000 bond is part of the estate of Mrs. Jackson which comes to Mrs. Overman as a distributee of that estate in due course of law. I am sorry that there should be so much trouble about this transfer, but I know of no other way to make it than that suggested, if it is to be done without any risk incurred on your part in doing it.

DAILY DEPOSIT ACT—BAD CHECKS

February 25, 1926.

Your letter of February 24th in relation to checks or drafts deposited to your credit by other departments of the State government under the deposit act which include in them either bad checks or checks that after they are given have been lost in transit. You request the opinion of this office as to what are your rights and authority under such circumstances.

A bank check is simply a written order directing a bank to pay money to the drawee of that check as stated therein. If the check is given for an antecedent debt or a debt contracted at the time it is given, it is not, and

can never be, a payment of that debt until it is presented in due course of business to the bank upon which it is drawn and is paid by the bank for the benefit of the drawer.

The checks with which your letter deals are those which were lost after the deposit was made in a particular bank or which turned out to be bad checks or checks drawn upon a bank which failed in the interval between their being drawn and their presentation for payment. In none of these instances is the drawer of the check relieved of the liability for which the check was given. Your claim, or rather, the claim of the department which collected the check, is undoubted and the same remedies exist in that department to proceed further in the collection of the amount so paid as existed originally before the check was given.

The deposit act in the proviso of section 1 thereof, Chapter 128, Public Laws of 1925, gives the Treasurer permission to refund the amount of any bad checks which have been returned to the department collecting them by the Treasurer and the same have not been collected after thirty days' trial. This provision, of course, is confined solely to bad checks. Where these bad checks develop after the deposit in the bank under the deposit act, the bank has a right to charge them back to your department and your department to charge them back to the collecting department, and that collecting department must proceed under machinery provided by law to make this bad check good, particularly by enforcing the original obligation to pay.

UNIVERSITY—UNCLAIMED DIVIDENDS

March 1, 1926.

Your letter of March 1st, enclosing a letter from Governor McLean and one from J. A. Warren, Treasurer of the University, to Mr. James A. Leake, has been considered, and we return herewith the enclosures.

Upon this data you ask the opinion of this office as to what should be done with the \$150 sent by Mr. Leake to the University and deposited by the University to its credit, with notice to you under the deposit act. You state in your letter that in your opinion section 18, Chapter 4, Public Laws of 1921, commonly known as the bank act, controls. That section does declare that dividends and unclaimed deposits remaining in the hands of the receiver for a period of six months after the order for final distribution by the court shall be deposited with the State Treasurer, who shall hold such funds as custodian without the payment of interest, subject to the order of the court appointing the receiver and without the necessity of appropriation by the General Assembly. The section proceeds and directs the State Treasurer to hold the fund subject to any future order by the court to pay such fund to an individual claimant.

Mr. Leake, it seems, was the receiver of the Wadesboro, N. C., branch of the Bank of New Hanover, which long since passed through insolvency, and we suppose the funds belonging to the bank have long since been distributed. We think that Mr. Leake acted properly in sending this fund to the University. There are two reasons why we think so. The right of the University to this fund had accrued before the enactment of section 18 of the

banking law. Second, because the Constitution itself in section 7 of article 9, thereof devotes these unclaimed dividends specifically to the University in these words:

The General Assembly shall provide that all the property which has heretofore accrued to the State or shall hereafter accrue from escheats, unclaimed dividends, or distributive shares of estates of deceased persons shall be appropriated to the use of the University.

This provision having thus been incorporated in the Constitution has the effect of prohibiting the Legislature from devoting these unclaimed funds, such as dividends from banks or corporations, whether solvent or insolvent, to any other purpose than to the University. The \$150 in question, then, being funds of this character were properly sent to the University by Mr. Leake, notwithstanding section 18 of the banking law.

STATE BONDS—TRANSFER

March 5, 1926.

We have considered the letter of Judge Varser to you dated March 2, 1926. Mrs. Thompson could have the registered bonds of her deceased husband transferred to her upon your record by supplying you with a certified copy of the will of Mr. Thompson, a certified copy of her appointment as executrix, and a general certificate from the Clerk of the Court of Onslow County that the estate has been fully settled and that she has filed her final account without any necessity of resorting to these bonds as assets of the estate.

DEPOSITORY BONDS—SECURITY

March 16, 1926.

In your letter of March 11th you ask my opinion as to your right to take bonds of the United States and the State of North Carolina as security for moneys deposited by you in banks selected as depositories.

In an opinion of October 9, 1923, former Attorney General Manning advised you that you might do this. In that opinion (which you no doubt have in your file), he set out the reasons for so holding. I concur in the opinion then furnished you by Judge Manning, and the reasons upon which he based the ruling.

In addition to that, you now have specific legislative authority for receiving such bonds as such security. That authority is found in section 2 of Chapter 128, Public Laws of 1925. It directs that you require security from such banks "in a sufficient amount to protect the State on account of any deposit of State funds made therein. It authorizes you to take this security in a bond or in lieu thereof, collateral security "consisting of such bonds as are approved for investment by the State sinking fund."

We turn to Chapter 62, Public Laws of 1925, and find the act providing for the creation of a State sinking fund commission. Section 5 of that act sets out the securities in which the State sinking fund is to be invested. Without setting out the provision of that section in this letter, I refer you to it as containing list of the kind of bonds that you could accept as such collateral security.

DAILY DEPOSIT ACT—PAYMENT

March 16, 1926.

Referring to our conversation on yesterday, I call your attention to Chapter 128, Public Laws of 1925, entitled "An act to require the deposit of all funds belonging to the State of North Carolina daily with the State Treasurer." By section 4 of that act you are authorized and empowered to select depositories convenient for the deposit of money by various officers, representatives and employees of the State who are required by the act to comply with its terms. By section 1 all moneys collected for the State are required to be deposited in one of these designated depositories in the name of and to the credit of the State Treasurer each day as such moneys are collected. By sections 2 and 4 the banks so selected by you are made official depositories and under section 2 you are directed to require of these banks security in the form of a bond or otherwise to protect the State on account of the deposits so made.

As a consequence, the deposit of the moneys as directed by this act in the depository selected by you is a payment to the State, assuming, of course, that the money is actually deposited or that checks so deposited are honored in due course. As you have selected these various depositories at different places in the State, and under the terms of the act must necessarily do so, I am unable to hold in accordance with the idea suggested by you, that funds deposited must actually reach Raleigh.

CHECKS PAYABLE TO STATE—EXCHANGE

March 19, 1926.

I have your letter of March 17th. I understand that the specific question you submit is as to whether banks have a right to charge exchange on moneys due the State. Stating it somewhat differently, I will say that you have no right to pay exchange for the collection of money due the State. Funds due the State should be paid to it without any diminution whatever.

In saying this, I do not mean at all to undertake to pass on the question of the payment of exchange as between your depository and some other bank. I have no right to do that. If a check is sent you and the effort is made to collect exchange out of you on it, you should refuse to receive it as payment of the claim or taxes for which it is tendered. I think this is the only position you can take. But the dealings between your depository bank and the bank upon which the check is drawn are to be regulated between those two.

I have tried to express myself clearly herein. If I have failed to do so, please write me again about your difficulties and I will give further attention to the subject.

TORRENS ACT—GUARANTEE FUND

April 7, 1926.

In reply to your verbal inquiry of this morning, I have to say that I am of the opinion that the assurance fund provided by I. C. S. 2422, Chapter "Land Registration," should receive interest on the amount on deposit in bank held awaiting investment as provided for by that section. I call your attention to that section as showing securities in which this fund may be invested.

DEPOSITORY BONDS—ATTORNEY-IN-FACT

August 13, 1926.

In re Matter of Bank Depository Bonds

Whenever these bonds are executed by an attorney-in-fact of a surety company, and not by the officials of the surety company itself, it is always well to have the bonds accompanied by the power of attorney which authorizes the attorney-in-fact to execute the bond. This, under all circumstances, may not be necessary, but it is certainly wise to require it, because quite frequently these powers of attorney limit the amount for which the attorney may bind the company, and in some instances limit his authority as to the character of the bond which he can execute.

OPINIONS TO THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

SCHOOL FUNDS—DENTAL CLINIC

September 10, 1924.

In the letter of Mr. E. R. Hardin, Robeson County Health Officer, to you dated September 6, he asks whether or not the county board of education can devote any part of the funds levied and raised for the purpose of conducting the schools for six months in the county, to the support of a dental clinic in one of the large schools in the county. We think this would not be legal as it is not distinctively an educational purpose and would require, to validate it, special authority from the Legislature.

SCHOOL FUNDS—COUNTY TREASURER

September 10, 1924.

In your letter of September 10, 1924, you propound to this office the questions which are hereinafter stated seriatim, with the answers appended.

(1) Raleigh Township voted a bond issue of \$1,000,000 for the construction of school buildings in Raleigh Township. Under the provisions of the charter this money is handled by the County Treasurer. Is the County Treasurer entitled to any compensation for handling this fund?

Answer: In Wake County the County Treasurer is paid a salary and required to collect the usual fees and commissions which are turned into what is called a salary fund. This salary fund is used for the payment of salaries of public officers and its excess under the statute goes into the general county fund. Section 260 of the new school code, Chapter 136, Public Laws of 1923, has this provision:

That no treasurer handling the funds derived from the sale of any school bonds shall receive any commission therefor.

We interpret the expression "any school bonds" as including all bonds issued and sold after the going into effect of the new school code, which became effective on April 15, 1923. We think it was not the purpose of the Legislature in using these broad terms to confine the school bonds, upon the receipt or disbursement of the proceeds of which no commission is allowed, to those authorized by the school code itself. Consequently, in the opinion of this office, the County Treasurer of Wake County is not entitled to any commissions on the disbursement of the proceeds of the bond issue of \$1,000,000 for the construction of school buildings in Raleigh Township after April 15, 1923.

(2) The county commissioners of Wake County approved the budget for the school year 1923-1924 as presented by the county board of education.

The sheriff has failed to collect about \$40,000 of the taxes. Can the commissioners charge up the proportional part of these delinquent taxes to the school fund, thereby making the total amount of money supplied to the schools less than the amount approved in the budget?

Answer: We think not. The adoption of the budget amounts to a declaration on the part of both the county commissioners and the board of education when agreed to by both of these bodies, that the amount stated therein is necessary for the conduct of the schools for the six months' term. Section 189 of the school code contemplates the borrowing of money by the county commissioners when the amount provided in the budget shall be insufficient to meet the absolute needs of running a six-months' school term, and providing equipment for the same or paying existing indebtedness for the said purpose. If, therefore, the amount of uncollected taxes reduces the amount assigned to the county board of education for necessary purposes in the conduct of the schools and proves insufficient for any reason, the commissioners must borrow the money necessary. If the \$40,000 allowed to insolvents and uncollected taxes, as above said, reduces the amount so assigned to the county board of education so as to render it insufficient, there must be a borrowing of money to supply the insufficiency. Section 191 requires the county commissioners to furnish the county board of education, as soon as the tax books for the year are complete, a statement showing what per cent the school fund is of the total county fund and at least, this same per cent of the amount of taxes as they are collected and deposited in the treasury shall be placed to the credit of the county board of education. See also Section 179.

(3) Can a school committee with the authority of the county board of education employ a committeeman's son, who is over twenty-one years of age, as truck driver or as janitor for the school in which his father serves as committeeman?

Answer: Yes, but not if the son is under twenty-one years of age.

(4) A petition signed by a majority of the voters in the northern end of Wilder's Grove special tax district have petitioned the county board of education for an election on increasing the local tax rate for schools in that part of the district from 20 cents to 30 cents, the purpose being to consolidate the northern end of the Wilder's Grove district with the Millbrook school district, which has a tax rate of 30 cents. The board of education wishes to know if this petition can be approved legally and the proposed consolidation made. The county board of education has not yet adopted a county-wide plan.

Answer: We think this cannot be done as stated in the question. A similar result can be reached by the application of section 226 of the school code, and we suggest the application of that section to the conditions presented.

SCHOOL TRUCKS—PRIVATE PUPILS

September 13, 1924.

Mr. O. S. Dillard, Superintendent of Public Schools of Jackson County, asks you in his letter of September 10 whether or not one of the public

school trucks hauling pupils to a public school may also at the same time haul pupils to a private school. As a matter of strict legal authority, we think not. It might arise, if it was adopted as a general policy, that the pupils of the private school would crowd out those of the public school.

BOARD OF EDUCATION—VACANCY

September 13, 1924.

In your letter of September 9 you state that a vacancy occurred in the Iredell County school board about June. It was such a vacancy as under the statute—section 16 of the new school code—the State Board of Education was required to fill. The extra session convening, however, soon afterwards it left the question of filling the vacancy to that body. It did not, however, take any notice of the vacancy in Iredell County. It did declare in an act passed specifically for Iredell County that the board of education of Iredell County should consist of five members and then, disregarding the vacancy, elected two other members for that board.

Upon this you inquire as to the authority of the State Board of Education to fill the original vacancy under the circumstances detailed above.

We think that body should fill this vacancy. It is evident from an inspection of the act that its main purpose was to increase the membership of the board of education of Iredell County to five, and the only way that that membership under the conditions above detailed can be kept at five is for the State Board to fill this vacancy.

SCHOOL DISTRICT—DISTRIBUTION OF FUNDS

October 3, 1924.

In this letter you enclosed a letter addressed to Honorable A. T. Allen, Superintendent, by Mr. H. C. Renegar, upon which you request the opinion of this office as to what can be done about the situation developed from the incorporation of the Benson high school district by Chapter 145, Private Laws of 1915.

It is evident that this high school thus incorporated is not to interfere with school districts as then laid off and special taxes as authorized in the school districts laid off by the act. Section 13 of the act expressly declares:

The special taxes herein provided for shall in no wise affect the special tax levied and collected from time to time for maintaining and operating the schools of said district, but this tax shall be in addition to all other school taxes levied and collected in said district.

We would suggest as an equitable solution of the problem that the proceeds of the taxes levied upon the property of negroes located in the high school district under the high school act be devoted to the maintenance of the negro school in the district as constituted at the time of the enactment

of the act. The difficulty probably arises from a disregard of the constitutional provision in regard to separate schools for each race but without discrimination in favor or to the prejudice of either race, which constitutional provision is incorporated in section 1 of the new school code. We think, however, the constitutional difficulty may perhaps be eliminated by adopting the course suggested.

SMITH-HUGHES ACT—STATUTE—APPROPRIATION

November 13, 1924.

A difficult situation has arisen out of the apparent conflict between the appropriation act of 1923, chapter 163, section 33, sub-section (f), and section 289 of the new school code, chapter 136, Public Laws, 1923. The latter section makes an appropriation out of the State public school fund of a sum of money for each fiscal year equal to the maximum sum which may be allotted to the State of North Carolina from the Federal Treasury under the provisions of the Smith-Hughes act and the Industrial Rehabilitation act, namely, for the fiscal year ending June 30, 1924, \$147,405.88 and for the fiscal year ending June 30, 1925, \$171,990.03. The remainder of the section continues specific appropriations indefinitely for the fiscal years in the amount of \$196,664.18. These amounts were evidently ascertained upon the calculated apportionment of the amount of the Federal appropriation for these various fiscal years.

The Federal act is to be found in sections 9390 $\frac{1}{4}$ (a) et seq. Compiled Statutes of 1918, pages 1518 to 1522, inclusive. Section 9390 $\frac{1}{4}$ (e) concludes, so far as material, as follows:

The moneys expended under the provisions of this act in cooperation with the states . . . shall be conditioned that for each dollar of Federal money expended, the State or local community, or both, shall expend an equal amount.

The appropriation act above referred to appropriates \$150,000 annually to meet this appropriation of the Federal Government for the fiscal years 1924 and 1925. A simple comparison will show that the \$150,000 appropriated for 1924 slightly exceeds the appropriation necessary to meet the Federal appropriation as calculated, and set out in section 289 of the school law, but at the same time, the \$150,000 for the fiscal year 1925 is \$21,990.03 short of the amount which will be allocated to the State of North Carolina for that fiscal year under the calculation set out in section 289 of the school code. The question presented by this situation is as follows:

Does the appropriation made in the appropriation act of 1923 control and become effective over the appropriation made in section 289 above set out? After considering the matter carefully, we are of the opinion that the appropriation act controls. It may be mentioned in the first place that the appropriation act was ratified on the 5th of March, two days after the school code was ratified on March 3. The primary consideration in dealing with apparently conflicting laws is their reconciliation if possible.

The budget system adopted by the General Assembly in 1919 is still in force in dealing with the finances of the State and the cost of administering the government. The appropriation bills made by the General Assembly have as their foundation the report of the budget commission. In that bill the General Assembly, then, is legislating with the purpose to provide an adequate sum of money for the support of the various institutions and causes of the State government. Sub-section (k) of section 36 of the appropriation bill, chapter 163, declares:

If any part of the appropriation in sub-sections (c), (d), (e), (f), (g), (h), (i) and (j) are not expended for the purposes specifically mentioned in either of the said sections, the balance may be used by the State Board of Education in supplementing the funds of either sub-section in this section if in its judgment the needs of the same demand an increased appropriation.

In this latter provision, then, the General Assembly seems to be meeting the condition arising from the fact that the appropriation of \$150,000 for the fiscal year ending June 30, 1925, would not be sufficient to meet the appropriation of the Federal Government. We advise, then, that you investigate in the first place whether or not the sum of \$150,000 for the fiscal year ending June 30, 1925, may not be supplemented from the other funds provided for in the act in such way as to met the sum of \$171,990.03 of the Federal Appropriation for that fiscal year. If that cannot be done, then we know no other resort that you have than to the General Assembly, which convenes in January, 1925. In the appropriation act the attention of the finance committee of that body was directed definitely to the necessary appropriations to be made for all purposes and objects. This being true, we think that it would control an appropriation incidentally made in the act enacted previously thereto when dealing with the general subject of the school system.

SCHOOL BONDS—SPECIAL BUILDING FUND

November 14, 1924.

In re The Jonesville School District Bond Issue

It seems that this district, acting under article 22 of the new school code, voted an issue of school bonds in the amount of \$12,000 and that said issue and the election upon which it was authorized was validated by a special act at the recent extra session. You desire to know whether in the opinion of this office the governing authorities of the Jonesville School District can disregard the special bond act and the special election, and borrow from the State building fund the amount necessary in lieu of issuing bonds.

We think not, unless for some reason the bonds authorized to be issued cannot be sold in the markets. If they cannot be sold, then we think they could resort to the special building fund in the manner provided in the act.

SCHOOL FUNDS—SINKING FUND

November 17, 1924.

It is unfortunate that the investments of the sinking fund of the Chadbourn School District in Columbus County should have been made in such an unbusinesslike method. Chapter 466 of the Private Laws of 1911 provides the machinery for issuing building bonds in that school district. It appears that the bonds were voted, issued and sold to the amount of \$10,000. The statute in section 3 requires a special tax to be levied in that district to pay the interest and provide a sinking fund for the payment of the principal of this indebtedness. The sheriff of the county was required to collect these taxes and pay over the same to the treasurer of Columbus County. There was, however, no provision made in that act for the care and investment of the sinking fund. This situation was met by the enactment of Chapter 90 of the Private Laws of 1917. Section 1 of that act authorizes the school trustees of Chadbourn School District No. 3 to lend the money already accumulated and to be accumulated as a sinking fund. Section 2 requires the security of all loans to be approved by the board of education of the county and the superintendent of public instruction. Section 3 requires the county treasurer to turn over these funds to the board of trustees—manifestly, however, that they might be loaned by said board upon proper security and the way specified in the act. Both of these acts are silent as to the custody of the security so taken. We think it quite clear as a necessary inference, however, from their wording, that the county treasurer, up to the time that office was abolished in Columbus County, must be the custodian of the securities so taken. It could not have been intended that this board of trustees which had no treasurer itself and was not bonded in the management of the sinking fund, should thus retain the securities after they had been taken upon the loan of the sinking fund.

As we understand it, the office of county treasurer has been abolished in the county of Columbus, and a county auditor elected under Chapter 190 of the Public-Local Laws of 1923. As a consequence the board of commissioners under that act have probably designated some bank as custodian of the funds of the county. We think it would be the duty of the county auditor to look after the securities taken by the board of trustees and see that all of them are properly deposited for safety in the bank so designated by the board of county commissioners.

Chapter 1 of the Extra Session of 1921 plainly requires this board of trustees to report to the State Auditor as to the condition of this sinking fund and the securities taken by the said board upon its loan. We suggest, therefore, that you bring the matter to the attention of the State Auditor.

SCHOOL DISTRICTS—CONSOLIDATION—SPECIAL TAX

November 19, 1924.

We have considered Mr. Furr's letter to you and have come to the following conclusion:

He states that in Rowan County the board of education has adopted the county-wide plan of organization as contained in sections 73a *et seq* of the

new school code, and has divided the county into units, one of these units composed of several districts or parts of districts. His letter is not definite upon the question whether the consolidated district in question is composed of special tax and no special tax districts. We assume, however, that this is a fact in the particular district.

It is purposed, now, to levy a local tax in one of these units composed as above stated. He inquires whether the question of special tax should be submitted to the whole district or to the districts composing that consolidated district. Section 77 of the new school code, in dealing with consolidated districts having different local tax rates, declares that after consolidation the only tax rate that can be levied in the consolidated district is the lowest tax rate voted in any of the districts which form a part of it. The object of the consolidation is, of course, to make the tax rate in the consolidated district uniform. We think that the question of a special tax in the instant case should be submitted to the voters within the consolidated district, regardless of the former districts as thus consolidated under article 17 of the new school code. The effect of this election thus held in the consolidated district would be to repeal the special tax now authorized in the district consolidated with non-tax districts. The Supreme Court in interpreting this situation in *Sparkman v. Commissioners*, 187 N. C., 241, came to this conclusion.

SCHOOL DISTRICTS—BONDED INDEBTEDNESS

November 20, 1924.

It is well known that the Raleigh Township School District is not coterminous with the boundaries of the City of Raleigh; that it is controlled by a school committee appointed specially for the district, and that the city governing authorities do not control such district. Under conditions of this sort a question has arisen as to what is the permissible amount of bond issue for schools within such district, and secondly, shall the bonded indebtedness of the city itself be taken into consideration in determining the permissible amount of bond issue in the school district.

Stated in round figures, the taxable valuation of property within the Raleigh School District is \$50,000,000. There are outstanding \$1,150,000 of school bonds which are liabilities of the district. The school district itself being a separate corporate entity, with its boundaries not coterminous with those of the city, and not subject to control by the governing authorities of the city, we think that the amount of bonded indebtedness of the city should not be included in determining the permissible amount of bonds to be issued by the school district, but only the bonded indebtedness of the school district itself.

Section 264 of the new school code, Chapter 136, Public Laws of 1923, deals with this question in what we regard as a plain and distinct manner. That section is as follows:

Limit of bonds. No bonds shall be issued by or on behalf of a district under this act which, including indebtedness for schools thereof then outstanding, shall exceed five per cent of the assessed valuation of taxable property therein; and no school

indebtedness of any kind or nature shall be created or assumed by a county under this act, including all school indebtedness of such county and the aggregate amount of all school indebtedness of the districts within such county in excess of five per cent of the assessed valuation of taxable property within such county. In computing the amount of indebtedness under the district or the county limitations hereinabove fixed, school indebtedness of cities and towns lying within a school district or within a county shall be included as if the same were a school district indebtedness, but there shall not be included any indebtedness of a district, city, town, or county payable from current revenues, and school bonds issued under the provisions of this act shall not be subject to any debt limitation by any other act.

We think, then, that the opinion of this office is sustained by this section. That section restricting the indebtedness of such a school district to five per cent of the assessed valuation of the taxable property therein, permits an additional issue of bonds of the school district amounting to \$1,350,000.

COMPULSORY EDUCATION—PRIVATE SCHOOL

December 11, 1924.

Your letter of the 9th inst., enclosing a letter from R. W. Allen, Superintendent of Schools of Anson County, referring to the case of *State v. Johnson*, decided by the Supreme Court on November 19, 1924, is received. I have the opinion of the Supreme Court in that case before me and have carefully read the same.

The principal difficulty in the case was that the warrant was not properly drawn and not so drawn as to charge the offense prescribed in the statute, Section 5758, C. S. The court rules, following the language of that statute, that the offense is the failure of the parent or guardian or other person in the State having charge or control of the child between the ages of eight and fourteen years, to cause such child to attend school continuously *for a period equal to the time which the public school in the district in which the child resides shall be in session*. The warrant charges the parent in that case with failure to cause the child mentioned in the warrant to attend the public school of the district. The Court upon this statute ruled that the burden was upon the State to show that the parent or other person having charge of a child of the age fixed by the Statute did not cause the child to attend *any* school for the period equal to the time which the public schools in the district were open, and not simply that the child did not attend the public school. It is very clear from this statute, I think, that if the child attended a private school, taught for the same length of time as the public school, that the parent would not be guilty of any offense, and to repeat what the Court said, the burden of proving this fact, to wit: that the child did not attend any school at all, private or public, rested upon the State.

SCHOOL FUND—PENALTIES

January 1, 1925.

It is right difficult to run distinctly the line between penalties to which a town is entitled and those which are to be covered into the school fund under Article 9 of the Constitution. This may suffice:

The General Assembly clearly has a right to give such penalties to a town to be enforced only by a civil proceeding brought in the name of the town to enforce the penalty. The summons which you enclosed is evidently attempted to be drawn under this principle. It is a civil summons. Under it no officer, police or otherwise, could arrest the defendant, and if judgment is given at the hearing, it could not be enforced except upon civil execution issued against the property of that defendant. On the face of this summons, then, the town is bringing a civil proceeding against the party named therein, and if the General Assembly has given the penalties arising from a breach of a town ordinance specifically to the town, that remedy may be enforced civilly. As soon, however, as the town steps beyond the civil remedy, it is basing its proceeding upon the criminal law of the State, which makes the breach of a town ordinance a misdemeanor. Any fine or penalty then levied under such proceedings goes to the school fund under the decisions of the Supreme Court. A town using the summons accompanying the papers sent us is placing itself in a dangerous position with reference to the defendant. Its officers probably arrest him as though it is a criminal warrant, and if they do, they are liable for an action for false imprisonment.

SCHOOL DISTRICTS—NON-RESIDENT PARENTS

January 17, 1925.

We return herewith Mr. T. Wingate Andrews's letter of January 15th. In that letter he states:

A few men living outside the city limits with children attending the High Point schools, contend that they are entitled to credit on their tuition on account of taxes paid by corporations in which they own stock. They have no property listed under their own names in the city.

Upon this you inquire whether this contention is sound. We are quite clearly of the opinion that it is not. We think the proper interpretation of section 241 of the school code prevents it from applying to that limited property interest in a corporation which is represented by a share of stock in that corporation. The General Assembly in the act itself was conferring a privilege upon the parent living outside the special charter district yet owning property in that district to have the taxes levied upon that property for school purposes in the district applied in abatement of the tuition of his children. This property evidently must be listed in the name of the parent with the taxes thereupon charged against him before the privilege of this statute could be invoked. He does not pay any taxes upon corporate property. On the contrary, the corporation as a separate entity pays those taxes.

SCHOOL BONDS—SINKING FUND

January 21, 1925.

We have considered the letter of Mr. J. H. McIver to you in regard to sinking funds for old type bonds. He does not describe the bonds with sufficient definiteness for us to render any opinion upon it that would be helpful. If he is referring to bonds issued under C. S. Section 5682, the county board of education has the control of the sinking fund and its investment. Where, however, the statute is silent in regard to the sinking funds, the board of county commissioners as a general rule should have control of the sinking funds and of their investment. If they have no character of authority at all in a particular case, there should be special legislation providing for the proper investment of the sinking fund and its safety.

BOARD OF EDUCATION—SALE OF LAND

January 26, 1925.

We have considered the letter of Mr. R. L. Phillips to you, dated January 21st and return the same herewith.

Section 62 of the new school code does contemplate that the board of education shall advertise any sale of land belonging to them for twenty days at three public places in the county. It authorizes them to reject any and all bids and then sell said school property at a private sale if they can make a more advantageous sale thereby. It seems that the board of education of Graham County sold the land in question without this preliminary advertisement but upon advantageous terms at private sale. Whether or not the board was wrong in doing this, it is quite clear, we think, that its action in this regard would not affect the validity of the deed made to the Tallassee Power Company, the statute itself not declaring a deed so made void. There is no reason in section 29 of article 2 of the Constitution why the General Assembly has not constitutional power to pass a curative act with reference to this particular transaction. It is quite probable, if they passed it, however, they would put in a clause making it inapplicable to existing suits.

We are writing this opinion for your benefit, upon the latter question principally. Except upon that we think it would be improper for us to render any opinion at all, as the matter seems to be in court.

COUNTY TAX—EIGHT MONTHS SCHOOL

January 30, 1925.

You inquire of this office whether or not in its opinion the Legislature has constitutional authority to authorize counties in the State to submit to the qualified voters thereof the question of whether a county-wide tax shall be levied sufficient in amount to run the schools of the county for a period of eight months. It is observable that under this scheme there is no limit to the taxation beyond which the Board of county commissioners cannot go.

I am using the county as a unit in the discussion, but the discussion itself would apply as well to special tax and charter districts.

Section 7 of Article 7 of the Constitution prohibits counties, cities, towns or other municipal corporations from levying or collecting any tax unless authorized so to do by a vote of a majority of the qualified voters therein, except for the necessary expenses thereof. All tax levies beyond the necessities arising from the requirement of the Constitution—that the term of the schools shall be six months—are regarded by the courts as not necessary expenses. If, therefore, the question after authority is obtained from the Legislature is submitted to the qualified voters of the county, plainly and distinctly as taxes sufficient to run the schools for eight months and the voters authorize such taxation after the method has been approved by the General Assembly itself, I see no substantial reason for holding the act unconstitutional as offending against Section 7 above referred to.

There is, however, a practical aspect to the question that should be suggested in the discussion. Very few constituencies would grant to the tax levying authorities a blanket authority such as this, to levy taxes for the future. The courts themselves do not control the discretion of administrative and subordinate governmental authorities when that discretion is exercised under competent authority and not oppressively or illegitimately. If the county commissioners have this blanket authority to levy a sufficient tax to run the schools for eight months, there would be no means of controlling their discretion as to the amount of tax to be levied if that discretion was legitimately exercised and exercised in good faith. The board of education might itself increase the salaries of teachers and the expenses of conducting the schools beyond the point at which the voters would be willing to sanction those expenses and they, consequently, would be without remedy except the political remedy which would be in their hands to defeat the particular officials at the next coming election.

For these reasons as well as the fact that the constitutionality of such an act might be impeached successfully in the courts, I advise that the limit of taxation be fixed in the bill beyond which the governing authorities cannot go.

COUNTY COMMISSIONERS—SCHOOL INDEBTEDNESS

February 10, 1925.

I have before me letter of even date from Mr. T. B. Atmore, Superintendent of Schools, Pamlico County, submitted to me by your Department. From this letter it appears that the board of county commissioners of Pamlico County issued bonds in the amount of \$125,000 in accordance with article 23, school code of 1923. It also appears that the amount necessary to take care of the interest on these bonds and sinking fund, which was due January 1, 1925, was not included in the budget submitted by the board of education of Pamlico County. In an opinion under date of September 27, 1923, Attorney General Manning seems to indicate that only the other school indebtedness of the county, not including that contemplated by article 23 of the school code of 1923, should be included in the school budget. I am informed that

the school authorities have taken this position and have heretofore been acting in accordance with it.

On the letter from Mr. Atmore, submitted to me, it does not appear necessary to consider or pass on the question as to whether the particular indebtedness in question should be included in the school budget as submitted by the board of education to the board of county commissioners. There can be no question about the obligation resting upon a board of county commissioners to take care of the interest and sinking fund necessary to provide for the payment of these bonds. Section 185 of the school code of 1923 lays this obligation upon a board of county commissioners, and I, therefore, advise that it is the duty of the board of county commissioners of Pamlico County to provide the necessary funds to meet the amount due on these bonds at this time.

SCHOOL ELECTIONS—AUSTRALIAN BALLOT

February 19, 1925.

I have your letter of the 18th, together with letter of Mr. John L. Hathcock, Superintendent of Schools of Sampson County, asking whether the Australian Ballot law for his county applies to an election in a school district under articles 18 and 22 of the school law of 1923.

Because of the various acts on this subject, a direct reply to this question is very difficult. Under Chapter 606, Public-Local Laws of 1917, providing the Australian Ballot for Buncombe, Henderson and Madison counties, school elections were excepted from its operation. This form of ballot has been made to apply to several other counties by an amendment to this act.

In construing the act, this Department in a letter of April 19, 1924, to you advised that these amendatory acts also limited the Australian Ballot to general elections and did not make it apply to school elections.

By Chapter 37, Public Laws, Extra Session of 1924, the Australian Ballot was provided for the counties of Stanly, Brunswick, Alexander, Yancey, McDowell, Cherokee, Surry, and Caldwell. This act follows the Buncombe law, but it does not except school elections as that does and it seems to contemplate in section 1 and section 2, sub-section (i) that it shall apply to all elections. The application of the Australian Ballot to Sampson County is provided by Chapter 217, Public-Local Laws, Extra Session of 1924. The title of this act purports to make Chapter 606, Public-Local Laws of 1917, applicable to Sampson County but in the body of the bill it amends House Bill 109, Senate Bill 132, Extra Session of 1924, which is Chapter 37, Public Laws, Extra Session of 1924.

On February 9 of this year, Mr. Nash wrote Mr. C. A. Reap, County Superintendent of Stanly County, with reference to the same subject. He reached the conclusion that the Australian Ballot law did not apply to these school district elections. There is much to be said in support of either view, as you may readily see when I advise you that from a study of the history of these various acts, I am inclined to think that school elections in Sampson

County would be controlled by Chapter 217, Public-Local Laws of 1924, which applies Chapter 37, Public Laws of 1924, to all elections held in that county.

Mr. Nash and I agree that the matter is one of great doubt and that being so, an election held either under the Australian Ballot law or under the general law as set out in the school law of 1923, might result in litigation to test the validity of taxes voted or bonds issued. Both of us, therefore, think that the matter should be cleared up at this session by a specific act of the Legislature providing directly that such election shall, or shall not, be held under the Australian Ballot.

SPECIAL TAX ELECTIONS—SIX MONTHS

February 24, 1925.

I have your letter of February 20, sending letter of Mr. R. W. Allen, Superintendent of Schools in Anson County. He inquires if a special tax election may be held in less than six months after the first election. I think that it cannot. The intent and purpose of section 225 is to prevent these elections being held oftener than once in a six months' period.

CONSOLIDATED DISTRICT—ELECTION

February 27, 1925.

I have your letter sending letter of Mr. R. W. Allen, Superintendent of Schools of Anson County. I agree with you that it seems that under the county-wide plan adopted in Anson, the local tax district by being combined with the non-local tax district has been put out of existence under the decision in *Bivins v. Board of Education*, 187 N. C., 769. I think that the special tax election may be held in the consolidated district under the authority of the *Sparkman* case, 187 N. C., 241.

We are so busy in the office just now that it is impossible to go into the matter with any degree of thoroughness, but we think that the case referred to holds that an election may be held in the consolidated district.

SCHOOL BONDS—SPECIAL BUILDING FUND

March 9, 1925.

I am in receipt of your letter, sending letter from Mr. T. T. Murphy, Superintendent of Schools, Pender County.

Mr. Pittman and Mr. Murphy, representatives from that county, conferred with me in regard to this matter some days ago. They wanted to know if the county could obtain a loan for these districts from the special building fund, although the bonds had been voted, and if the county could withhold issuing the bonds following the election. I advised them that I thought the

issuance of the bonds would not be obligatory but that the loan could be obtained from the State Board of Education if it had sufficient funds for that purpose and would make the loan out of the special building fund.

The letter of Superintendent Murphy presents a somewhat different question and it is not entirely free from doubt. It appears that the two districts have each voted to issue \$25,000 in bonds. I assume that this action was taken under the provisions of school code, article 22. That article contemplates the issuance of bonds and provides how the bonds shall be issued. The act providing for the special building fund provides that the county board of education may make loans to districts and that these loans are to be repaid out of the local taxes voted by the particular district. It gives the county a lien on these taxes for the purpose of repaying the loans.

There is a proviso to section 284 as follows:

Provided, this lien shall not lie against taxes collected or hereafter levied to pay interest and principal on bonds issued by the authority of any district.

There seems to be no statute providing for an election in a special tax district to levy a tax to meet the interest and payment on loans to be made a county out of the special building fund. It is very doubtful if a tax may be levied and collected under an election held under article 22 and the proceeds applied to the payment of principal and interest on a loan obtained from the special building fund. There appears to be no decision of the Supreme Court on the subject. It is my opinion that the Court will probably hold that a tax could not be levied and collected as the result of an election under article 22 and the taxes so obtained applied to the repayment of a loan obtained from the special building fund.

Of course, it is too late now to pass any act on the subject.

SCHOOLS—DANCE HALL—NUISANCE

March 11, 1925.

Principal E. E. Smith of the State Colored Normal School at Fayetteville, N. C., writes you in a letter dated March 9 that a colored man has erected a dance hall within a few hundred yards of the normal school, on the opposite side of the railroad from the school, and that this dance hall is a menace to the best interests of the school, and a nuisance to the community. We have searched the statutes of North Carolina quite fully and find none which deals with the situation depicted by Prof. Smith. Section 55 of the Revenue Act of 1925 contained a proviso which would cover the situation, but in the passage of the act through the Houses, the General Assembly struck out that proviso. It was as follows:

None of the amusements herein enumerated (included in these, in the opinion of this office, were dance halls) shall be carried on within five hundred yards of a church, hospital or school.

Why it was stricken out, we do not know. If it was reenacted in another statute, that statute has not been found by us. It appears, then, that the school has no remedy except the common law one of applying to a court of equity for an injunction against the conduct of this dance hall in such proximity to it as to constitute it a public nuisance with special damage to the school.

SCHOOL DISTRICTS—ILLEGAL CONSOLIDATION

March 12, 1925.

Mr. Murphy, Superintendent of Schools of Pender County, is in our office and has presented these questions to the office for solution:

It seems that the county board of education in Pender County, acting under Section 73(a) of the School Code of 1923, has consolidated the public schools of that county into seven districts. In creating one of these consolidated districts it put together three existing districts and a portion of a fourth through inadvertence. They have called an election to levy a special tax in this latter district so formed. The first question presented is: Was this consolidation, taking only part of the fourth district, legal? We think not. Both Article 6 of the School Code and Article 18 of the School Code contemplate consolidation of whole existing districts and not cutting up into fragments of existing districts and consolidating those fragments with other whole districts. *Sparkman v. Commissioners*, 187 N. C., 241.

Second, it appears that an election in this district so illegally formed has already been called and the date of the same is fixed for March 21, and the registration books have closed. Section 220, in the proviso, permits the county board of education for any good and sufficient reason to withdraw the petition for an election before the close of the Registration books. Manifestly, we think that this confers authority upon the county board of education to recall an election for reasons not concerning the legality of the organization of the district itself. If the foundation of the election—the consolidation—is illegal, every step since taken to hold the election is void. For this reason we think that the county board of education should petition the county board of commissioners at a called meeting, to recall the particular election as nothing would be accomplished by holding it if any of the voters within the district so consolidated would object to the tax and attack the legality of its levy in the courts. To hold the election, then, would be an utterly vain thing.

ACT OF 1925—SEPARATE BIDS

March 19, 1925.

I have your letter of March 18, asking for a construction of House Bill 623, Senate Bill 1108, Public Laws, 1925. You ask: "If separate bids on plumbing and heating are called for, and one man is low on both, is the intent of this bill such that I would be required to let either the plumbing or heating to a separate firm at a higher figure?"

My answer is that you would not be so required. The purpose of this act is to require separate specifications for

1. Heating and Ventilating.
2. Plumbing and Gas Fitting.

It does not mean at all that the two contracts must be let to different persons when the same person has the lower bid on each. The specifications are to be provided and the bids received on the two items as classified and the contract awarded to the bidder making the lowest bid on each. If the lowest bid on each is by the same person, the contract should be awarded to him.

STATUTES—CONSTITUTIONALITY

March 28, 1925.

You submit two acts passed at the recent session of the General Assembly amending the school code of 1923, the one introduced by Mr. Coulter of Alamance and the other by Senator Mendenhall from Guilford, and ask the opinion of this Department on them.

The Coulter bill undertakes to amend section 226, school code of 1923 (now C. S. 5646) by adding at the end of line 14 the words "or by any part of the new territory." Generally, this section 226 provides that local tax or special charter districts may be enlarged by submitting the proposition for such enlargement to the voters of the contiguous territory proposed to be attached to the existent local tax or special charter district. Upon a majority vote of those within the new territory, such territory would become a part of the old district and subject to the tax theretofore voted for increased school facilities and to meet interest and sinking fund for bonds of the district proposed to be enlarged. The section as originally written is constitutional, for the voters in the new territory are at the election by their votes subjecting themselves to a similar tax to that already voted by the old district.

Under the Coulter bill it is proposed by a vote of those within the new territory to attach that territory to the old district and to carry with them the taxes they have theretofore voted for bonds. In my opinion this amendment is unconstitutional for the reason that it seeks to impose a special tax for bonds on the old territory without submitting it to the voters thereof.

The Mendenhall bill rewrites section 230 of the school code of 1923 and provides a method whereby a district wholly within the limits of a city or town may be enlarged by attaching other territory so as to make the district coterminous with such city or town. Under the explicit provisions of this bill, such district could not be enlarged by taking in such territory if the territory proposed to be added has any bonded debt for school purposes other than the general indebtedness which it shares with the other districts of the county. A procedure is provided in the act by which enlargement of the district may be submitted to the voters of the new territory under the supervision of the governing body of the city or town. The act provides a well considered plan for the extension of districts to which it has application, and I advise that it is constitutional.

LITERARY FUND—STATE LOANS

April 8, 1925.

Your letter of April 7 in regard to loans from the literary fund received. School code, sections 273 *et seq.*, contemplates that loans made to the county board of education from the literary fund shall be reloaned to the districts. It is my opinion that these loans should not be made unless there is a special tax for their repayment.

FUNDING INDEBTEDNESS—SECTION 266

April 14, 1925.

It seems that the school district of Southport, in Brunswick County, in anticipation of a bond issue for the erection of the school building in 1922, borrowed money and used the same in the erection of this building. The bonds were voted and issued in 1923. They were sold immediately after issue, the proceeds of the sale collected and deposited in the Bank of Southport, which seemed to have financial connection with the Commercial National Bank of Wilmington and upon the failure of these banks the money so deposited as belonging to the school district was lost except as to any dividend that may hereafter be declared.

The effect of this is to leave two classes of outstanding indebtedness against the school district: one, incurred for borrowed money in anticipation of the bonds, and the other incurred by the sale of the bonds a little later. As the notes were not paid, they are still an outstanding obligation of the school district. The school district itself is one administered under the statute by the county board of education and is supported by county levies and county funds, while a local district levy is made to meet the bond issue. The outstanding indebtedness for borrowed money and represented by notes was incurred before the 1st day of January, 1923. It is the desire and purpose of both the county board of education and county board of commissioners to fund this particular outstanding indebtedness under sections 266 *et seq.* of the school code of 1923. It was an indebtedness incurred in providing a building for the conduct of the school in this district for the constitutional term of six months and so is a necessary expense. It is apparent from the above recapitulation why this indebtedness has not been heretofore refunded. Under the circumstances, though the matter is not free from doubt, we think that the board of county commissioners may now refund this indebtedness under sections 266 *et seq.* of the school code.

BOYS' ROAD PATROL

April 17, 1925.

The General Assembly at its recent session transferred the duty of the Board of Agriculture as defined in C. S. Sections 4931 to 4935, inclusive, to the State Board of Education. In addition to this transference, it added at the end of Section 4931 the following:

Whose duty it shall be to appoint a director of the work of the boys' road patrol in the State of North Carolina.

Section 4934 as amended reads as follows:

All moneys for the carrying out of this article shall be provided by the counties themselves in cooperation with the State of North Carolina. The commissioners of the counties of North Carolina are empowered to make annual donations out of the county funds for the purpose of this article.

Section 4935 as amended reads as follows:

Said brigade shall not be organized in any county until the commissioners of said county set apart and appropriate not less than \$100 for the purposes of this article to be spent in said county by the State Board of Education.

There is nothing in these sections as thus amended which requires the State Board of Education in specific terms to spend any part of the funds appropriated to it for the purposes of the article. We have examined the appropriations act of 1925 and can find in it no specific appropriation for the boys' road patrol nor any specific appropriation to the State Board of Education for such boys' road patrol. There is an express prohibition against the use of any sum appropriated therein for any other purpose than that for which it is appropriated. This section imposes a heavy penalty upon any person thus misusing a specific appropriation.

As the law is thus written, then, the only money available for the boys' road patrol is that provided by the counties in which it is organized. It is clear, therefore, that the duties of the State Board of Education are confined to appointing a director of the work of the boys' road patrol and of administering the fund provided by the counties.

CONSOLIDATION—ELECTION

April 23, 1925.

I have your letter of the 21st sending letter from Mr. Emmett C. Willis and asking my opinion on the matter therein submitted. It is stated that an election was called in the Southmont Special School taxing district, Davidson County, in conformity to the county-wide plan of organization but that the election officials failed to appear on the date set for the election and no election was held. It is my opinion that this would not be held to be an election under Section 225, school code of 1923, and that an election can be called in the same territory within less than six months. However, there may be some slight doubt as to this, and it would certainly be better to wait until after the six months, if possible, before calling another election.

In reply to your second question, it is my opinion that it will be necessary for the county board of education to modify the county-wide plan as provided by sub-section 2 of Section 73(a) as amended in 1924 before an election could be called creating a special taxing district composed of three of the five districts as originally grouped in the county-wide plan.

BOARD OF EDUCATION—SALE OF SCHOOL SITES

April 27, 1925

I have your letter of the 22d, sending letter of Mr. R. L. Patton, Superintendent of Public Schools, Burke County. The question submitted is not at all free from doubt and I have been unable to find anything that definitely settles it.

My impression is that the county board could sell the school house under the conditions stated. I assume that it will take care of the children in this particular district in some other way. You do not ask whether further payments on the obligation can be made out of special tax funds from the district should the school house be sold. On that question I am of the opinion that such school funds could not then be used for that purpose and that it would be the duty of the county board of education to take care of the obligation otherwise. As stated, there is doubt as to the right of the board to proceed as indicated. This doubt could only be determined by a court. If the county board is of the opinion that a sale of the school building under the conditions named would be for the best interest of the community affected, I think it will be well for it to take such action and let the matter be determined in court if the right of the board to so act should be contested.

BUILDING CONTRACT

April 27, 1925.

In the Matter of Building Contract of East Carolina Teachers College

The effect of this contract, stated in broad terms, is to constitute the Beaman Construction Company, Raleigh, N. C., as the builder of an addition to be erected on the campus of the East Carolina Teachers College. Instead of being an independent contractor, the Beaman Company in reality is the agent for the college in the erection of this building. The company's compensation is on the percentage basis, 6 2-3 per cent of the total cost of the building. In this light there ought to be a slight modification of article 11 (a) of the contract. The Beaman Company has charge of all the workmen and all the material used in the erection of the building. Any employers' liability insurance, then, that is taken should be taken out in the company's name and not in the name of the college. The college is itself a part of the State Government and cannot be made liable for any tort committed by its agents or its servants. Consequently, any indemnity insurance for their benefit would be worthless.

The contract contemplates that the college shall keep in some bank subject to the order of the contractor an adequate sum of money to meet all payments due to laborers or material men in the process of construction. Th contractor is to give a fidelity bond in the amount of \$75,000 for the faithful management and accounting for the sum of money so deposited to its credit from time to time. The bond attached to the contract in the sum of \$75,000 appears to be in proper form. The contractor is further required to give a construction bond in the sum of \$50,000, with adequate surety for the due performance of his contract in the erection of this building. He has given this bond and it is attached to the contract.

There are two serious objections to that bond. The first is contained in article 5 of the bond which attempts to limit both the construction company and the college from making any changes or alterations in the plans or specifications for the work unless the bonding company is immediately notified of such changes or alterations, giving a description thereof and stating the amount of money involved by such changes or alterations. It further attempts to prohibit the permission of these changes where the aggregate amount added to the contract would equal \$5,000. Further in the same article of the bond, the bonding company attempts to enlarge the contract as set out in article 12 thereof in regard to the delay in the completion of the work. There is no reason why this should be done as the contract speaks for itself and no addition should be made to it in the bond if the bonding company is to secure the faithful performance of that contract. Indeed, we have never seen a bond before given for the due performance of the conditions of the contract which attempted to add other terms to said contract than those set out therein.

The second serious objection to it is article 8 of the bond, which attempts to set up a statute of limitations against any action against the bonding company for six months after the time fixed in the contract for completion of the work mentioned therein. This is expressly prohibited by C. S. Section 6290 and while void under the statute, in the opinion of this office the bond itself ought not to be accepted with such a provision in it.

We notice on the minutes of the board, April 14, 1925, the following:

Motion was made by Mr. Andrews and seconded by Mr. Lee, that the president and secretary of the board be empowered to sign building contracts recommended by the building committee. The motion was carried.

We suggest that before you sign the contract, you should get specific recommendation from the building committee for this particular contract.

STATUTE—CONSTITUTIONALITY

April 30, 1925.

You submit me letter of Mr. Frank M. Martin, Superintendent of Schools, Durham County, in regard to recent amendments to sections 175 and 179, School Code, 1923. These sections provide that with the approval of the board of county commissioners, the county board of education may include in the operating and equipment fund the indebtedness of all districts, including special charter districts, lawfully incurred in erecting and equipping school buildings necessary for the six months' school term. Mr. Martin wants to know the opinion of this office as to whether this provision is constitutional.

In *Bank v. Lacy*, 183 N. C., 373, the Court held that the erection and equipping of school buildings was a proper expense for the conduct of the six months' school term and that an indebtedness for such purpose could be incurred without submitting the same to a popular vote. The Court has

not passed on the question as to whether the county may assume school indebtedness already incurred for such purpose. Of course, therefore, I cannot say with positiveness as to what the position of the Court may be when this proposition is presented to it.

My opinion is that the amendments referred to are constitutional and that the county may take over this indebtedness to the extent that it ascertains that such school buildings and equipment are necessary for the conduct of the six months' school term. Both on reason and by such authority as we may find in the Lacy case, I am firmly of the opinion that this may be done.

Quite probable the action of a board of education and a board of county commissioners under these amendments will be contested in some county. When that is done, the opportunity will be presented for the Supreme Court to definitely pass upon the constitutionality of the enactment. It is my opinion that the Court will uphold them and thus afford the opportunity for a further development of the county as the unit for our school system.

I think that the proper procedure under these amendments would be for the county board to take the appropriate action looking toward the assumption of this indebtedness and to present the matter to the board of county commissioners. Of course, if the board of county commissioners does not approve, further action could not be taken. If the board of county commissioners does approve, the necessary funds should be provided for in the budget and included in the taxes levied for schools for the current year.

COUNTY BOARD—INDIVIDUAL ACTION

May 12, 1925.

I have your letter of May 9th, sending letter from Mr. R. W. Isley, superintendent of Caswell County schools. It seems to me that the matter submitted is one about which this board should be advised by its regular attorney. It is always difficult to advise with respect to proceedings of a board and written instruments unless the attorney has all papers before him. And besides, in matters such as this there are usually controverted questions of fact with which we can hardly be acquainted.

The change from a special charter district to a local tax district is covered by section 157, school code of 1923. I note that the protest from three of the school board dated April 29th sets out that the board "has never considered any such petition, as none ever having been presented or discussed at any called meeting of the board." The fact as to whether the petition presented on December 29th was the result of the official action of the board or of securing the signatures of the four at some other time, seems to be controverted and does not seem to be established either way by the papers submitted. It is my opinion that the board must act officially and as a body in either some regular or called meeting for that purpose. They ought not to take any action unless such meeting is held and full opportunity for discussion afforded. The determination of this question of fact is first necessary before I could say whether any subsequent steps were legal.

In view of the fact that one member of the board seems to have died and that the steps in the process of changing the status of the district are con-

tested, would it not be well to complete the membership of this board and let proper action then be taken. If the county board of education will have its attorney to advise these people as to the necessary steps to be taken as the process goes on, it would seem that the matter could be so handled as to avoid the contest which now seems likely. I make this suggestion because surely the change can be handled properly in accordance with the statute so as to avoid litigation.

STATUTE—TRANSPORTATION OF PUPILS

May 14, 1925.

You recently submitted to me letters from Mr. G. M. Guthrie, superintendent of schools of Hyde County, asking for an opinion on House Bill 1176, Senate Bill 986, Acts of 1925, entitled "A bill to be entitled an act to require school districts of Hyde County to bear the expense of buying trucks and like vehicles for the transportation of school children, and to bear the cost of operating the same." I am also in receipt of letter from Mr. Carol B. Spencer of Swan Quarter, sending copy of his letter to Mr. Guthrie advising him on this subject.

The first section of this act does not undertake to prevent the operation of motor vehicles for the transportation of children by the board of education of Hyde County. It simply provides that the several districts shall be liable for the cost of such maintenance and operation. Therefore, in so far as this section has force and application, the county board of education may still continue to operate motor trucks and other vehicles in the transportation of children to and from school.

This section seems to contemplate (and that construction is borne out by the title of the act) that such operation shall be continued by the county board but that in some way the several districts shall reimburse the county school fund for such expense. It does not suggest or provide how this shall be done. It is my opinion that the special taxes voted by the districts could not be used in reimbursing the county school fund for this expense so incurred in the maintenance of the six months' school term.

It is apparent, then, that any liability of a particular district for such expenditure has no machinery provided by which it may be enforced. It may be that the districts may vote upon themselves special taxes for the purpose of meeting the liability thus attempted to be created, but until some such action is taken, there are no means provided for its enforcement.

The second section of the act provides that before any such equipment is hereafter purchased and placed in operation, the question as to whether such shall be done shall be submitted to a vote of the several districts. If a majority vote "for trucks," then it shall be lawful for the board of education or the district to purchase and operate such equipment.

The whole act seems to contemplate placing the liability for the operation of motor trucks upon the several districts. There is no direct prohibition upon their use by the county board of education for the maintenance of the six months' school term.

I understand that the schools of Hyde County have been largely consolidated or are in process of consolidation. It has high schools and high school

students as follows: Sladesville, 54; Swan Quarter, 71; Lake Landing, 55; Fairfield, 35; Engelhard, 15. It appears that trucks are being used to carry children to these schools at Sladesville, Swan Quarter and Fairfield, and horse-drawn vehicles in conveying children to some of the other schools. It also appears that some of these children are being conveyed seventeen or eighteen miles in order to give them the benefits of this high school instruction.

In undertaking to construe the act, it will be unnecessary to review all of our constitutional and statutory provisions with respect to the six months' school term. It is known by all that every other provision of the Constitution must give way to this primary obligation—the maintenance of the six months' school term. It was held in the Granville County case, 174 N. C., 473, that high schools were a component part of the public school system contemplated by the Constitution. In *Lacy v. Bank*, 183 N. C., 373, it was held that the erection and equipping of school buildings was a necessary part of the public school system, and that bonds might be issued for such purpose without submitting such matter to a vote of the people as required under article 7, Section 7 of the Constitution with respect to expenditures for other than necessary expenses.

In the light of these constitutional provisions and the decisions of our Court on the subject, high schools have been established in Hyde County and it appears that a number of the children entitled to high school instruction live at such distances from the buildings that they cannot readily attend such schools without being transported. Our general school law provides for necessary transportation of children to these schools for the six months' period.

In view of the situation existing in Hyde County, and of the right of each child to an equal opportunity to obtain the benefits of the six months' school term, I am of the opinion that the county board of education may continue to operate trucks for such transportation as a necessary part of the six months' school term expense. It would seem that the act in question, considered in the light of the situation existing in that county, and the general school law on the subject, does not necessarily prevent this action on the part of the school board. In saying this, I must also say that the question is not entirely free from doubt. However, I think, as stated, that the county school board should continue to provide such transportation, and if their right to do so is challenged, the Supreme Court can then authoritatively pass upon the question presented.

EQUALIZING FUND—BUDGET BUREAU

May 26, 1925.

In reply to yours of May 25th. The General Assembly of 1925 appropriated to the State Board of Education as an equalizing fund for the year 1925-26, \$1,500,000, and for the year 1926-27, \$1,500,000. By section 2(a) of the appropriation act \$1,164,461.97 in each of the two year periods is directed to be allotted to the same counties and on the same basis as the allotment of the same amount was made for the year 1923-24. The remainder of the equal-

izing fund was to be apportioned by a special equalizing fund commission. This fund to be apportioned by this equalizing fund commission will amount to \$335,538.03 at each yearly period.

It has been suggested by the director of the budget that it will be necessary to reduce all appropriations made by the General Assembly of 1925 by 5 per cent under section 8 of the appropriation act. You inquire how this reduction is to be made upon the appropriations above set out. We think it quite clear that the 5 per cent reduction for the first period, 1925-26, to which only it is applicable, is to be made from the total amount appropriated, \$1,500,000. The balance left after such reduction is to be allotted in the same proportion as the principal sum was to have been allotted under the act without the reduction.

BOARD OF EDUCATION—TAX RATES

May 28, 1925.

I herewith undertake to answer the questions submitted by you for the school authorities of the Waynesville Special School Taxing District.

(1) Would all the schools in a special taxing district be required to run the same length of time?

If the schools in such a taxing district were organized on any basis other than that described in section 73, school code of 1923, as a "special high school district embracing two or more school districts," they would not be required to run for the same term under the technical provisions of the law. It may be bad educational practice to operate a central high school for a longer term than the elementary schools of the surrounding territory which feed the central high school. I take it that the ultimate aim is to operate the elementary and high schools within such a district for the same length of term, but there may be reasons why such cannot presently be done in particular instances. I am of opinion that under the law the authorities might operate the high school and the elementary schools for a different length of term.

(2) What authority has the county board of education to fix the rate of local tax to be levied in a special taxing district?

The law is not quite clear as to this, should there be a difference of opinion between the county board of education and the authorities of the district. Sections 152, 222, 236 and 237, school code of 1923, and the general tenor of the whole code, indicate that this rate should be worked out in conjunction between the district committee and the county board of education, and contemplate joint action by them.

(3) Can the special tax rate in a special taxing district be lowered by the county board of education without a petition from the local committee?

Here we have another doubtful matter and one about which there may easily be two opinions. The law certainly contemplates that the committee and the board shall act jointly in submitting a request to the board of county commissioners for fixing this rate. I am inclined to think that without joint action by the county board and the committee showing that they agree upon the request to be made as to the tax rate, the board of county commissioners

would probably be justified in levying the rate last recommended by the duly constituted recommendatory authority, which would be the rate levied for the preceding year.

(4) If the special taxing district can finance a nine months' term and thus qualify as a city school under section 4, school code of 1923, can such school then demand the insertion in the budget of the amount sufficient to pay for a supervisory officer?

I assume that you mean to ask if the special taxing district could require provision for such officer. It could not. Preparation of the budget is in the hands of the county board of education and in my opinion the districts cannot impose their wishes on the board in this respect.

I should say further with respect to all of these questions except the last, that there may be some doubt, and they could only be authoritatively answered by decision of Supreme Court. I am undertaking to give you my best opinion from the reasoning of the thing and without having any specific opinion of the Court upon which to base the conclusions I have reached.

SPECIAL TAX DISTRICT—COUNTY—REPEAL

July 30, 1925.

We have considered carefully the letter of Superintendent Beam of Lincoln County and the accompanying papers. It seems that the Board of Education of Lincoln County has created a special school taxing district in that county by taking the whole of the county with the exception of the special charter district within the corporate limits of the Town of Lincolnton. Acting under articles 18 and 22 of the school code of 1923, an election has been called in said special school taxing district first, to determine the question of the levy of a special tax in that district not exceeding forty cents on the one hundred dollars value of property, and second, upon the issue of one hundred thousand dollars in bonds and the levy of a special tax sufficient in amount to provide for the principal and interest of said bonds. The papers initiating these two elections were carefully prepared and are in proper form.

The first question that Mr. Beam puts to this office through you is whether or not, if the special tax of not exceeding forty cents is authorized by the election in the district, this would operate to repeal all school taxes theretofore voted in any local tax or special charter district located within said special school taxing district. Section 238 answers this question directly and positively that it does, repeal such local tax in the terms just used. Section 238 further authorizes the county board of education to assume all indebtedness, bonded and otherwise, of any local tax or special charter district included in the special school taxing district.

Mr. Beam in his letter further says that the levy of forty cents on the one hundred dollars of property within the special taxing district is amply sufficient not only to take care of the special needs of the district, but also of any bonds outstanding in the local tax districts theretofore. He further says that it will be amply sufficient to care for the principal and interest of

the one hundred thousand dollars of bonds which is submitted as a separate and distinct proposition to the people at the same election. Upon this he inquires whether it will be necessary to levy any tax to take care of the issue of bonds in case a majority of the qualified voters in the special taxing district authorize the bond issue. It is very clear, we think, that if the people authorize the issue of one hundred thousand dollars of bonds, they also under the wording of the act, section 261 of the school code, vote upon and authorize a special tax sufficient to meet the principal and interest of these bonds. We think, therefore, that the board of education has not authority to refuse to levy this special tax so authorized for this specific purpose.

They can accomplish the same result, however, which they contend for in this way: They can levy under the special bond election sufficient tax for the purposes of those bonds and then when they come to levy a special tax under authority of the special election, they can reduce the forty cents authorized by the amount levied for the bonds, provided, of course, their estimate that the forty cents is amply sufficient to take care of all the purposes for which it is levied and also the bonds to be issued under the election is correct.

Stated shortly, assuming that the election is carried in the affirmative on both propositions, they must levy sufficient tax to take care of the bonds as a separate and distinct proposition, and then they have authority to levy not exceeding forty cents on the one hundred dollars of special tax in the district. Instead of levying this forty cents, they can exercise their discretion and levy a smaller amount so as to not tax the people more than the forty cents on the one hundred dollars. The authority to make each of these levies, however, is to be found in the result of the election in each case. Of course, the existing board cannot by any promise bind any subsequent board; therefore, a subsequent board, if it finds that it is necessary to do so, can in addition to the levy of the bond tax, levy up to the full limit of forty cents on the one hundred dollars. There is no way to avoid this condition.

SCHOOLS—SEWER CONNECTION

August 20, 1925.

I have considered the letter of Mr. H. G. Robertson to you dated August 17th, and herewith return it.

He states in his letter that the new colored school is within the city limits of Snow Hill and he requests to be informed as to whether the county board of education or the city shall extend a sewer line to the school. After a sewer line has been established, the governing body of any city or town may require all owners of improved property which may be located upon or near any line of such system of sewerage to connect with it, and fix charges for such connections. The General Assembly of 1923 provided for the construction of sewers through an assessment plan. That plan operated in broad terms just like the assessment plan in the construction of sidewalks. Parties interested were required to pay according to the benefits to their

property. We suppose that the town of Snow Hill acted under the old system of constructing its sewers through a bond issue and consequently, that city may compel the school authorities to connect with the sewer if it is within reasonable distance of the schoolhouse. If, however, it is so far distant as to make the cost of connection prohibitory, then the city or town should build the sewer in such way as to permit the school property to connect with it, the town, of course, charging the connection fees. What those fees are is largely a question for the governing authorities of the town within the bounds of reason.

SPECIAL TAX DISTRICT—REGISTER OF DEEDS

August 22, 1925.

You enclose in your letter the letter of Mr. A. L. Martin, Superintendent of Schools at Murphy, N. C., in which he propounds the following question:

Is it lawful for the register of deeds to charge local tax districts extra for setting in the special rate, where the register is working under the fee system, said extra fee to be charged to the district?

We think not. The concluding clause of section 74 of the Revenue Act fixes the compensation of the register of deeds for computing the taxes and making out tax list at not more than 10 cents for each name appearing on the tax list. This includes the original and duplicate tax list and also the receipts and stubs, and this amount is to be paid by the county treasurer out of the county funds.

STATUTE—UNCONSTITUTIONAL

September 14, 1925.

At your request we have examined an act of the recent Legislature entitled "An Act to issue Bonds to Fund the Debt for School Buildings of Magnolia Special Tax District in Duplin County" and have come to the conclusion that the act is unconstitutional for two reasons: first, it offends against Section 29 of Art. 11 of the constitution in that it attempts to define the boundaries of a school district; and second, because it attempts to impose a bond issue upon a school district and a special tax to pay the same without submitting the bond issue and special tax to the qualified voters of that district.

We have not examined the journals of the two houses to ascertain whether this bill was enacted in accordance with section 14 of Art. 11, i.e. the proper roll calls on different days in both houses. If there were not such proper roll calls, this would be another reason why the act is unconstitutional.

STATE BOARD—SALARY SCHEDULE

October 9, 1925.

In your letter of October 6th you ask: "Does the salary schedule as prepared by the State Board of Education under the authority of section 57 apply to superintendents, supervisors, principals and teachers alike, or does it apply to teachers only?"

By the express terms of section 57, school code of 1923, it is provided that: "The State Board of Education shall adopt a uniform graduated salary schedule for all teachers, principals, supervisors, superintendents and assistant superintendents." Therefore, the salary schedule so adopted does apply to superintendents, supervisors and principals as well as to teachers.

INDIAN NORMAL SCHOOL—TUITION

October 19, 1925.

Referring to our conversation Saturday in regard to tuition at the Normal School for Indians at Pembroke. I understand that the board of directors of that institution have imposed an entrance fee of \$4 upon all children matriculating therein. You inquire whether this requirement is legal. We think it is. The State of North Carolina supports this institution as a normal school, thus preventing its being a part of the public school system of Robeson County. It is true that the county itself appropriates \$1,200 or \$1,500 a year for the school. We are of opinion that this does not make the State Normal School a part of the county system.

In the matter of the siding of the Colored Normal School at Fayetteville. We have examined the contracts left with us by you Saturday and have concluded that they would be workable at any rate if this clause was added at the end of article 4th of the lease of railing, etc. to the school:

Provided, such damage or injury to persons or property upon such track or by fire set out by engines operating thereon was not occasioned by the negligence of the lessor itself.

We return herewith the contracts in question. We do not know whether this will prevent their signing the contracts. It is a reasonable stipulation. If it is, however, important for the institution to maintain the siding there and the railroad refuses to execute the contracts with this provision in them, we suppose there is nothing to do but sign up for it.

BOARDS OF EDUCATION—GROUP INSURANCE

October 31, 1925.

Mr. H. G. Bayles in his letter to you of October 20th gives a clear and excellent definition of statutory group insurance in North Carolina. See Chapter 58, Public Laws of 1925. His definition is as follows:

Group insurance may be defined as a blanket policy of insurance issued to an employer and covering all or certain classes of his employees (not less than 50 in number).

If the employer is paying the entire premium, the insurance must cover all of the employees in the defined classes.

If the employees are paying part of the premium, it must cover at least 75 per cent of them.

The law of this State does not permit the employees to pay more than three-fourths of the premium. The insurance companies have adopted the rule that the maximum contribution by each employee shall be 60 cents a month per \$1,000, the employer paying the balance.

Upon this he asks a ruling whether this statute permits certain employers to buy group insurance. The classes to which he refers are, first, county school boards, and second, institutions supported in whole or in part by State funds, as, for example, the various educational institutions of the State.

The questions which he presents are interesting and we wish we could see our way clear to holding that these employers could within the terms of the act provide group insurance for their employees. The trouble, however, in doing this is that the statute, Chapter 58 above, in the last clause of subsection (e) of section 2 thereof declares:

It shall be unlawful to make a contract of life insurance covering a group in this State except as provided in this chapter.

There are two methods provided in the chapter, as stated by Mr. Bayles: first, the cost of the policy is to be paid wholly by the employer or partially by the employer and partially by the employee. This requirement, therefore, plainly prevents any agreement among the employees to pay the whole of the insurance cost themselves. The school funds in the hands of the county boards of education and the institutional funds provided by the State in the hands of educational institutions are in no sense funds in the hands of an employer in such way as to permit him to use them to provide group insurance for the benefit of his employees. Funds in their hands are by the State devoted to specific purposes and cannot be diverted from those purposes to others not specifically allowed, however beneficial and wise the purpose may be in such diversion.

We think that the benefits of this act ought to be extended by the next General Assembly to employees of this class, and in the same connection we wish to make a suggestion which we made previous to the convening of the last General Assembly along a cognate line. The county boards of education operating trucks should be allowed by the General Assembly to take out group insurance policies to provide children injured in any way by the operation of those trucks with a source by which they could be compensated for such injury. The indemnity liability policy that now prevails accomplishes nothing in this regard, if it is construed according to its ultimate legal effect.

SCHOOL SITES—REVERSION

November 4, 1925.

We have considered the letter of Mr. Coon to you dated, October 29th. It seems that in Wilson County before 1901 the county board of education accepted deeds to school sites which contained a clause declaring that title to the land should revert the grantor or his heirs if it ceased to be used for school purposes. In several instances the land did cease to be used for school purposes, but before there was any entry by the grantor or his heirs, or any demand of possession on his part or their part, or any action brought by him or them, the board of education removed the building from the land. We think they were entitled to do this as, though it was a fixture, it was a fixture for a particular purpose, and the most effective method of showing that the board of education was not going to use it for educational purposes was to remove the building.

In the particular case cited by Mr. Coon, instead of removing the house from the land, the board of education dealt directly with the owner of a seven-eighths interest in the land and sold him the house. After he took possession of the land and building under this reversion clause and his purchase of the building, the owner of the one-eighth interest refuses to pay his aliquot part of the cost of the building. As the question has reached the point of a private controversy, of course, we could not be expected to render an opinion upon this particular aspect of the question. If the owner of the seven-eighths interest proposes to purchase the one-eighth interest of his co-tenant in the land, that also would be a matter of private contract between them. The owner of the seven-eighths interest is not required to purchase it at any figure. It is purely a matter of private contract. We return herewith Mr. Coon's letter.

SPECIAL CHARTER DISTRICT—AUDIT

December 23, 1925.

We have read carefully the letter of Mr. A. E. Hall enclosed in yours. We think it is entirely a matter for the State Auditor to determine as to whether he shall send one of his own force or employ an auditor to audit the accounts of a special chartered district under section 198, school code of 1923.

STATE BOARD OF EDUCATION—MARSH LANDS

January 2, 1926.

In the Matter of Topsail Sound—Bell Entries

The following short statement embodies what we understand to be the facts in the above entry and application to the Secretary of State for a grant. The Bell entries cover No. 539, 262 acres, and No. 538, 49 acres. Both of these entries are made of highland marshes in Topsail Sound.

They are covered by marsh grass and in unusually high tides are overflowed by the waters of the sound. Realizing that marsh or swamp land where the quantity of the land in any one marsh or swamp exceeds 2,000 acres is not subject to entry, Mr. Bell seems to have run the line of his survey across the sound at this particular point so as to take in these highland marshes and therefore contends that as there is not at that immediate point 2,000 acres of marsh land, these highland marshes are subject to entry.

We think this contention is not well founded, however. According to Mr. Eric Norden's letter to you, the marshes to which the State Board of Education claims title extend from Onslow County to Carolina Beach as one continuous marsh without any break except these highland marshes and artificial erections across the sound. In this marsh so extended there seems to be in the neighborhood of 23,000 acres.

The Supreme Court in *The Board of Education v. Lumber Co.*, 158, 314, sustained a charge to the jury to the following effect: "It is not necessary that every bit of the land in controversy should be swamp land in order to enable the plaintiff (the State Board of Education) to recover. That is to say, if there be some knolls or higher and drier places in this piece of land, that, taken by themselves, might not be deemed swamp, yet if they have swamp land around them in sufficient quantity so that the latter largely prevails and taking the whole body by and large, the general effect is to make and call the land swamp land. Then the knolls or higher ground could be taken as part of the whole." That is, should be taken as part of the swamp lands in ascertaining whether the swamp lands exceed 2,000 acres.

A comparison of this case with *Beer v. Lumber Co.*, 170 N. C., 337, will show how and under what circumstances there is a break of the continuity of a particular swamp in such way as to forbid the taking of the two parts together in determining whether more than 2,000 acres were in the particular tract. So far as Topsail Sound is concerned, however, there is no such break in the continuity of the sound and the marshes bordering it as to prevent the whole of it being taken into the estimate of more than 2,000 acres. We think, therefore, that the land attempted to be entered and for which a grant is asked of the Secretary of State belongs in reality to the State Board of Education. C. S. Section 5781 permits the Secretary of State to withhold a grant if he has reason to believe that the land covered by the entry, when a survey is made in pursuance of the same, is the property of the State Board of Education.

STATE BOARD OF EDUCATION—MARSH LANDS

January 15, 1926.

In re Topsail Sound—Bell Entries

I have your letter of the 13th with copy of letter from Mr. Warren. I would like to advise any procedure that would clear up a doubtful title for

the purchaser from the State Board of Education. However, in issuing grants, the Secretary of State is faced by the express provision of C. S. 7581:

And if the enginer or surveyor shall report that the lands in question are the property of State Board of Education and not subject to entry, the Secretary of State shall not issue a grant on such entry and surveys.

In this particular instance there might be no harm in making the deed and permitting the entry of the grant, but the precedent thus established might trouble us in the future, and in view of the express words of the statute, I would not feel at liberty to advise the Secretary of State to make the grant.

It seems to me that the grantee would be fully protected by the deed of the State Board of Education and that grant from the State would not be necessary to protect his title. The records would show transactions in respect to the matter; that the Secretary of State declined to issue a grant because the land belonged to the State Board of Education and that the Board thereupon sold the land to Mr. Warren.

SCHOOL DISTRICTS—TOWNS—EXTENSION OF CORPORATE LIMITS

March 3, 1926.

We have considered carefully the letter of Mr. P. S. Carlton of Salisbury, N. C., enclosed in your communication of February 26th. The General Assembly of 1925, by Chapter 99, Private Laws of that year, enlarged the corporate limits of the town of Spencer so as to include the shops and some other property of the Southern Railway Company. In this new territory there are no residents and consequently, no voters.

The school district of the town of Spencer, which was created and incorporated by Chapter 46, Private Laws of 1905, was coterminous with the corporate limits of the town of Spencer until the enactment of the act of 1925. Mr. Carlton wants to include, if possible, this additional territory in the school district and he finds nothing in the school code which permits it, section 230 of said code manifestly applying to conditions which do not appear in this case, as hereinafter stated. Indeed, there are no voters in the annexed territory.

The remainder of this opinion is suggestive to Mr. Carlton. If he sees fit to act upon the suggestions made therein, he can do so. This is the only method by which, in the opinion of this office, this adjoining territory may be taken into the school district and the school district again made coterminous with the corporate limits of the town.

Section 1 of Chapter 46, Private Laws of 1905, the act incorporating the Spencer school district and making it coterminous with the corporate limits of Spencer, contains this provision:

That the territory now embraced in the corporate limits of the town of Spencer, or that hereafter may be embraced in said

corporate limits by any change hereafter made in the same, shall be and continue one school district for the white and one for the colored race.

The necessary effect of this provision, unmodified by previous legislation, is to make the enlargement of the corporate limits of the town of Spencer automatically an enlargement of the school district of that town, the limits of both being thus so interwoven that the territory of the town could not be enlarged without by that fact itself enlarging the territory of the school district. In *Lutterloh v. Fayetteville*, 149 N. C., 65, it is declared that the authority of the Legislature is plenary to annex adjoining territory to existing towns without or even against the consent of those residing in the annexed territory, and the fact that the taxes are authorized to be levied in the corporate limits of the town and there is an outstanding bonded indebtedness, to both of which the inhabitants in the annexed territory would be subjected, does not affect the validity of such an annexation and enlargement.

Mr. Carlton, then, may with great plausibility contend that this territory covering the Southern Railway Company shops and other property in which no inhabitants reside has already been annexed to the Spencer school district by the act of 1905.

CONSOLIDATION—TAX RATES

March 3, 1926.

I have your letter of even date, submitting request for an opinion with respect to certain school districts in Catawba County.

It appears that on August 6, 1923, a county-wide plan of organization was adopted by the board of education of that county. The following appears as a part of the minutes of that meeting:

The Grace Academy, Blackburn and Plateau districts were consolidated with the understanding that the grammar grades be left, for the present, as they are now.

At that time Grace Academy district had a special tax of 30 cents, and Plateau and Blackburn, of 15 cents. In July, 1924, an election was held increasing the rate in the Plateau and Blackburn districts to 30 cents.

The adoption of the county-wide plan of organization does not *ipso facto* operate as a consolidation of the districts thus proposed to be thrown together by the plan. The sections of the statute on the subject indicate that the plan is to be adopted with the idea of carrying it into effect as there may be opportunity to do so. The plan may be in process of execution over a considerable period of time and no consolidation of districts becomes effective until the process is completed with respect to such districts and until a formal order of such consolidation is entered by the board.

As a consequence of the election in the Blackburn district in July, 1924, the plan of organization as it affected the districts here in question reached that completed stage where the board of education was in position to make

the order of consolidation. That was done on August 4th in the following language:

Ordered that the school district at Grace Academy be consolidated with the Blackburn High School District; and that the tenth and eleventh grades at Grace and the eleventh at Blackburn be transported by school truck to Startown High School. This arrangement being made only for the present school year.

You state that the contention is made that consolidation was effected by the action of the board on August 6, 1923, and that as a consequence, the local tax rate for the territory comprised within Grace Academy, Plateau and Blackburn was thereby reduced to 15 cents under the provisions of section 73, school code of 1923. From the information supplied, I am of the opinion that consolidation of these districts was effected only upon the adoption of the resolution of the board of education on August 4, 1924, and that since at that time the tax rate had been increased to 30 cents in all of the territory, the rate in the consolidated district is 30 cents.

It would appear that the sentence quoted above from the minutes of the board on August 6, 1923, is inexact in expressing what actually took place at that time. I suggest that this error in the minutes may be corrected and they made to speak the truth under the authority of *Railroad v. Reid*, 187 N. C., 320.

SPECIAL TAX ELECTIONS

March 9, 1926.

I have your letter of March 8th, submitting certain questions having application to special school tax elections, which I answer as follows:

1. How long must the proposed voter have resided in the territory prior to election day in order to be allowed to vote?

A. The voter must have resided in the State one year and in the election district four months preceding the election.

2. In case a voter has moved out of the territory, how long prior to election day must this removal have been before he is disqualified for voting?

A. Constitution, Article 6, Section 2, and the general law on the subject carrying that provision into effect, provides:

That removal from one precinct, ward or other election district to another in the same county shall not operate to deprive any person of the right to vote in the precinct, ward or other election district from which he has removed until four months after such removal.

My opinion is that this applies to general elections only. In the case of a special school tax election, I am of opinion that the individual who has moved his home from the district with the intention of making that home elsewhere has no right to go back and participate in the election even though the election is within less than four months of his act in moving.

The act of removing from the district with the intent to make his home elsewhere operates as a giving up of his residence in the district, and his right to participate in elections peculiar to the district terminates with the removal.

3. In case a registrant finds that it will be impossible for him to be in the territory on election day and unable to vote under the absentee voter's law, can he by written request have his name removed from the books?

A. The registration books having been closed, I am of the opinion that the registrant has no right to have his name removed therefrom.

CONSOLIDATION—SPECIAL TAXES

March 10, 1926.

It appears from the letter of Mr. B. C. Sisk, County Superintendent of Duplin County, that the County Board of Education of that County acting under a county-wide plan of organization as set out in section 73-a *et seq.* of the school code of 1923 had consolidated three special tax districts, each levying a tax of 30 cents, with certain non-local tax territory. They are submitting to the districts so consolidated the question of the levy of a special tax of 30 cents. Upon this he inquires:

Does the new 30 cent tax, if the election is carried, do away with the taxes now levied in the three local tax districts in such way as that the authority to levy the 30 cents in the separate districts will be entirely abrogated if the result of the election is in favor of the new 30 cent levy?

It is observable from Mr. Sisk's letter that he is not clear whether or not this portion of the territory which levies no local tax is a whole district or only part of a district. If it is part of a district, before the consolidation could be valid it must be in accord with the county-wide plan of organization. Subsection 5 of section 73-a. One difficulty in determining questions presented by some of the county superintendents of schools is the lack of a definite statement of all the facts which may or may not have a bearing upon the legal question presented. We shall assume in the first instance that this non-local tax territory comprised a whole district which was consolidated with three local tax districts, levying each a local tax of 30 cents. It seems quite clear that the consolidation itself repealed all local taxes in the three districts under section 77 of the school code. See *Sparkman v. Commissioners*, 187 N. C., 241, and *Bivins v. Board, Idem.*, 769. Consequently it is the opinion of this office that if a tax of 30 cents on the \$100 is voted in this consolidated district, it eliminates entirely the 30 cent tax authorized to be levied on each of the individual three districts existing before the consolidation.

This general statement requires a modification which may not exist in the instant case. If any one of the districts has issued bonds and they are outstanding, there is no way by which a special tax to provide the interest and sinking fund for the payment of those bonds can be eliminated unless

their payment is provided for in the 30 cent levy upon the consolidated district, or it is assumed by the county at large. How that is in the instant case, we are not informed. If the non-tax part of this consolidated district is part of a district, the question is more difficult. Still, we think that the voting of the new special tax of 30 cents upon the consolidated district would eliminate the old 30 cents for each district.

COUNTY COMMISSIONERS—SCHOOLS

March 27, 1926.

You left with us a letter of Mr. James E. Holmes, Superintendent of Leaks-ville Township Schools, in which he propounds certain questions. We will state these questions seriatim, with the answer in each case appended thereto.

(1) Does the Constitution of North Carolina make it mandatory that a six months' school be provided for the children in every community in the State?

Ans. Yes. Section 3 of Article 9 of the Constitution.

(2) Has the Supreme Court of North Carolina ruled that a school-house is a public necessity?

Ans. It has ruled that a schoolhouse is a public necessity when that schoolhouse is necessary to run the schools for the six months' term provided by the Constitution. *Lovelace v. Pratt*, 187 N. C., 686.

(3) Whose duty is it to provide buildings in which the six months' school is to be held?

Ans. The board of county commissioners under section 3 of Article 9 of the Constitution.

(4) From what source is the above mentioned duty imposed?

Ans. Section 3 of Article 9 of the Constitution.

(5) Is legislative authority necessary to authorize, empower and compel any "body" to erect schoolhouses?

Ans. No, if the schoolhouses are necessary to run the schools for six months.

(6) If so, what legislative enactment is necessary?

Ans. This is answered in the answer to 5. The Legislature has authority to provide machinery by which this constitutional duty may be performed by the board of county commissioners. This machinery will be found in the school code of 1923.

(7) The answer to this question is found in the answer to 6.

(8) Can a statute diminish the duties or powers as conferred by the State Constitution upon either the board of county commissioners or the county board of education in respect to the erection of schoolhouses?

Ans. The duty to erect schoolhouses for six months term is imposed upon the board of county commissioners by the Constitution. This duty cannot be lessened or the authority impaired by an act of the Legislature.

(9) Is there any way by which the board of county commissioners of Rockingham County can be compelled to erect schoolhouses where needed?

Ans. If they are needed to run schools for six months, and the board of county commissioners fail to erect these necessary schoolhouses, they are made indictable by the express terms of section 3 of Article 9 of the Constitution.

(10) Is the responsibility of those charged with the duty to provide school buildings the same for high school pupils as for elementary school pupils?

Ans. The Constitution, article 9, section 2, requires that free tuition shall be provided for all the children of the State between the ages of six and twenty-one years. High school tuition is necessarily included in this provision. *Board of Education v. Board of Commissioners*, 174 N. C., 469.

COUNTY COMMISSIONERS—SCHOOLS

March 30, 1926.

I have your letter of today, requesting my opinion on certain questions submitted to your Department by Mr. J. E. Holmes, Superintendent of Public Instruction, Spray, N. C.

Apparently, he wants my opinion upon the legality and constitutionality of a proposed bond issue of Rockingham County for the purpose of erecting schoolhouses. Any opinion that I might have or give him on the subject would not be authoritative or protective to the board of county commissioners or to the buyer of the bonds. My opinion could only be persuasive, and where there may be doubt as to the legality of an issue of bonds, or that legality depends upon the construction of a statute or the Constitution, it is better to obtain a judicial determination of the question.

I do not understand that Chapter 268, Public-Local Laws, 1925, attempts to prevent the issuance of bonds for the erection of school buildings necessary for the maintenance of a six months' school term. By the specific terms of the act it does not purport to apply to "the building, and equipping of public school buildings where there are no buildings to carry on the public schools for six months and none can be obtained without being built by proceeds from bonds or loans for said purpose."

There is, therefore, in the act an explicit recognition of the constitutional requirement for the maintenance of the six months school term, both by necessary taxation for the erection of school buildings as well as payment of ordinary expenses.

In *Lacy v. Bank*, 183 N. C., 373, the Court held that the act providing the special building fund was constitutional. All the reasoning in that opinion supports the idea that both the State and the counties may issue bonds for the erection of school buildings necessary for the maintenance of the six months school term without a vote of the people. Near the close of the opinion a caution is thrown out that the exercise of this power must not be arbitrary or without limit as to the amount. The number and character of the buildings must be in reasonable proportion to the need, and it is quite apparent that the Court would discountenance any extravagant expenditure undertaken on the assumed hypothesis that it was necessary for the constitutional school term.

No State officer can sit here in Raleigh and pass on all the phases of a matter such as is herein involved for local boards or officials. If the county commissioners of Rockingham County think that certain funds are needed for the construction of buildings necessary for the constitutional school term, they should act upon their view of the situation, giving consideration to all the surrounding facts and circumstances. If there be doubt that the issuance of notes and bonds for the purpose indicated be within the constitutional need, that doubt can be readily resolved by constituting a case for final determination by the Supreme Court.

HIGH SCHOOL TEXTBOOKS—ADOPTION

March 31, 1926.

I have your letter of the 29th asking: "Can the State Board of Education affirm the report of the High School Textbook Committee submitted as of March 22, 1926, and thereby complete the adoption of history and science books for the next three years?"

Article 31, school code of 1923, covering the subject of adoption of textbooks for high schools is not as clear and definite as to the law governing the situation which now arises as we could wish. However, in undertaking to answer your question we can from a consideration of the whole article reach a reasonably satisfactory conclusion as to its intent and purpose.

These sections evidently contemplate a five year adoption and that the whole subject shall be gone into at the expiration of each five year period. The proviso with respect to the adoption of textbooks on history and science for an initial period of two years only presents our chief difficulty. Considering the whole of the article and all of its provisions, I am of the opinion that at the expiration of the two year period the State Board of Education may approve the recommendation of the High School Textbook Committee for the use of the same books on history and science for the next three years.

STATE LOAN—COUNTY COMMISSIONERS

April 1, 1926.

In the Matter of State Loan to Madison County for Marshall School District

On February 17, 1926, the State Board of Education passed finally upon an application made by the Board of Education of Madison County, which application was approved by the Board of Commissioners of that County, for a loan of \$65,000 to be expended in erecting a school house in the town of Marshall. The application was also approved by the board of trustees of that school district and an election was held by which a majority of the qualified voters of the Marshall District voted thirty cents on the one hundred dollars of property in that district to meet the payments on said loan of \$65,000. Thereafter the State Board of Education allocated to each county

its proportional part of the \$5,000,000 available for loan to the various counties in the State. Included in this allocation to Madison County was the \$65,000 applied for and allowed by the State Board of Education. After all of this was done, a majority of the Board of County Commissioners of Madison County on March 23d, without any formal meeting or notice of a meeting, attempted to rescind its action in applying for said loan of \$65,000. This was done by taking a paper from one member of the board to another and securing thus the signatures of three members of the board, including the chairman. There has been no entry upon the minutes of the Board of County Commissioners of this attempted action on the part of a majority of said board.

After the loan was allowed, the school trustees of Marshall let out the contract for the school building, relying upon obtaining the money under the application approved as aforesaid from the State Board of Education. This letting of the building to contract was also after notice from the State Board of Education that the \$65,000 loan had been authorized. Upon this you inquire whether or not the Board of Commissioners of Madison County had any legal authority to rescind their action in approving this loan on March 23d, as they claim that they have done.

We are very clearly of the opinion that they had no such legal authority. The whole matter had passed beyond their control, certainly as soon as the State Board of Education had included the \$65,000 in the amount allocated to Madison County.

COUNTY SUPERINTENDENT—ELECTION

April 3, 1926.

In your letter of April 3d to this office you enclose a letter from Mr. G. D. Carter, a member of the county board of education of Buncombe County, which contains a statement of facts and upon that statement you desire the opinion of this office.

On the first Monday in May, 1925, W. C. Murphy was elected county superintendent by the Board of Education of Buncombe County. His term of office was to begin on the first Monday in July, 1925. He did not obtain a superintendent's certificate under the rules and regulations of the State Board of Education before qualifying the first Monday in July, 1925, and entering upon the duties of his office. Indeed, to the present date he has not obtained such certificate.

Three questions are propounded. First, is the election of Mr. Murphy as county superintendent of the Board of Education null and void because of his failure to secure a superintendent's certificate as provided for by law? The statute material to the determining of this question is as follows: (Section 44, School Code of 1923).

Limitations of the board in selecting a county superintendent. The county board of education is authorized to select for the office of county superintendent any practical teacher and administrator who holds or is entitled to hold a superintendent's certi-

ificate under the rules and regulations of the State Board of Education. If any board of education shall elect a person to serve as county superintendent of public instruction who does not qualify, or cannot qualify for the superintendent's certificate before taking the oath of office, the election is null and void and it shall be the duty of the board of education to elect only a person that can qualify.

It is observable from this statute that the election of the superintendent is null and void only when one of two conditions is presented in the case. (a) The superintendent-elect does not hold a superintendent's certificate. There is no doubt that Mr. Murphy did not hold a superintendent's certificate at the time that he was elected or subsequent thereto. (b) Or in the alternative, he cannot qualify for a superintendent's certificate. We are informed by you that there can be no doubt that Mr. Murphy could qualify if he applied for such certificate. Consequently, this being true, his original election could not be considered null and void as one of the conditions upon which it should be null and void is absent from the case.

Section 84 of the school law should be interpreted in connection with section 44, quoted above. So far as material to this discussion, that section is as follows:

The county superintendent shall hold at the time of his election, or must secure before assuming the duties of the office, a superintendent's certificate under the rules and regulations of the State Board of Education.

This statute acts directly upon the county superintendent. It imposes upon him a duty which the law make mandatory. If, therefore, he disregards this duty, he can be removed from office by the county board of education under section 46 of the School Code. The fact that Mr. Murphy has performed the duties of his office for nine months of his first year's incumbency without having complied with the law in this regard would in no sense, however, render his acts and deeds as county superintendent void so far as the public and third persons are concerned. He is acting as a public official with a defective title and that being the case, only the State or the authorities to whom the State delegates such duties can impeach his title to the office.

The second question propounded by Mr. Carter is as follows: Is the county board of education liable for the salary paid Mr. Murphy to date because of his failure to secure a superintendent's certificate? We think clearly not. Their duty was to elect a man who could qualify and obtain this certificate and it seems that in the instant case they did elect a man who could qualify and obtain this certificate. What occurs afterwards is the fault of the county superintendent himself. It was the neglect of a plain mandatory duty imposed upon him by the statute, but this could not render in any sense the board of education liable in any form for the salary paid him after he failed to comply with the law.

Third. Could a citizen of Buncombe County enjoin the board of education against any further payments to Mr. Murphy until the law has been complied with? We think not. The law itself in the sections above cited pro-

vides the machinery by which he can be compelled to comply with the law. It is a familiar rule that the title to office cannot be tried in an action for an injunction. It is to be tried in the absence of other provisions in the statute controlling by an action in the nature of quo warranto. In the particular case, however, the board of education has, as above said, under section 46 ample authority to remove the county superintendent because of his failure to perform this particular duty imposed upon him by mandatory statute (section 84). If the county board of education should fail to act under such conditions and if Mr. Murphy should continue to refuse to apply for a certificate from the State Board of Education, the Attorney General could bring an action in behalf of the State in the nature of quo warranto to oust him from his office.

We think that this is a correct statement of the law arising from the questions propounded by Mr. Carter.

SPECIAL TAX DISTRICT—ABOLITION

April 10, 1926.

You sent to this office letter of Mr. C. C. Bailey of Culberson, N. C., presenting certain questions arising out of an attempt to abolish the special tax districts under sections 227, 228 and 229 of the school code of 1923. The facts, stated shortly, are as follows:

About a year ago a petition was presented to the board of education of Cherokee County for an election in the special school tax district to determine whether or not the district should be abolished under section 227. The board of education endorsed this petition at that time and the county commissioners ordered the election. Soon after, however, and before the election was held, the attention of these two boards was called to the fact that this particular special tax district was in debt to the State and consequently, section 228 in express terms prohibited such election. Meantime, this debt has been paid off and the original petition which remained on file in the office of the board of education was destroyed at the burning of the courthouse of Cherokee County. The county board of education without a new petition and in the absence of the first petition which had been burned, requested the board of county commissioners to order an election and the order was entered by the board of county commissioners the first Monday in April of the present month.

Mr. Bailey very properly insists that these proceedings were certainly irregular and probably null and void. We agree with him. We think that the old petition was under the circumstances not available for the purposes used by them. Another petition should have been presented under section 227 and in conformity to that section the election ordered. Neither board had any assurance that the petition included one-half of the qualified voters then residing in the local tax district. Mr. Bailey states there are six or eight of the people whose names were appended to the former petition who will file affidavits at any time that they did not sign it. There are about thirteen of the persons who did sign the original petition who have removed

from the State, some to Georgia, some to Ohio and some to other states. He says also that there is a name on the original petition of a person who was never a citizen here and one whom nobody knows.

This recitation of the facts alleged show that both boards were wrong in ordering an election upon the old petition which had ceased to function and indeed, had been destroyed.

SCHOOL COMMITTEE—INCREASE

May 15, 1926.

It seems that they are having trouble in the Taylorsville Special Tax District in Alexander County over the election of teachers by the school committeemen of that district. The school committee elected teachers whom the county superintendent refused to approve. It is very clear that the county superintendent has a veto upon the election of all teachers in the county. The statute, section 101, declares that no such election shall be deemed valid until it has been approved by the county superintendent. Where, therefore, the county superintendent fails to approve the election of particular teachers, the committee should proceed to elect others who would meet with the approval of the county superintendent. If the action of the county superintendent is wholly arbitrary, he is subject to the control of the county board of education and the matter can be investigated by that body and if necessary, they may discharge the superintendent. But certainly the school committeemen cannot hold up the election of proper school teachers by refusing to act in the election of others after the superintendent has refused to give his approval to those elected originally. In the Taylorsville District the school committeemen, however, stood pat and refused to elect other teachers after the superintendent had announced to them that he would not approve the previous election.

This, of course, resulted in a deadlock. It is necessary that the school should be opened and run, for the benefit of the scholars in the district, at the proper time. It was under circumstances of this sort that the board of education of Alexander County at their meeting on the first Monday in May increased the number of the school committeemen from three to five, in the Taylorsville Special Tax District. This action of the county board is attacked on the ground that it was not taken at the meeting in April as required by sections 48 and 124, school code. We think that this is not a valid objection to their action. General statutes regulating the time of official action are with reference to the time directory only. Section 145 of the school code expressly confers upon the county board of education authority in their discretion to elect not less than three nor more than five members to serve as committeemen in local tax districts. Black in his Interpretation of Laws thus defines the principle which is applicable to the instant case:

When a statute specifies the time at or within which an act is to be done by a public officer or body, it is generally held to be directory only as to the time, and not mandatory, unless time is of the essence of the thing to be done, or the language of the

statute contains negative words, or shows that the designation of the time was intended as a limitation of power, authority, or right.

We think, therefore, that under the circumstances, the county board of education was justified in taking the action it did in order to break the deadlock between the county superintendent and the school committee of Taylorsville Special Tax District, and that the fact that the election occurred the first Monday in May instead of the first Monday in April did not impeach the validity of its action.

SCHOOL TEACHER—SALARY

May 25, 1926.

I have your letter of May 21, enclosing correspondence in regard to salary of Mr. Litchfield of Columbus High School, Tyrrell County. As to whether Mr. Litchfield can collect the additional \$120 cannot be authoritatively determined except upon an adjudication of the question by a court.

Until a court determines otherwise, I do not feel that I should advise that an extra sum be paid a teacher upon an attempted agreement based upon receiving an appropriation from the State. I think that the statutes on the subject contemplate an agreement between the teacher and the district for a definite sum. A teacher may receive an amount in excess of the usual salary schedule "for special fitness, special duties or under extraordinary circumstances." The law does not contemplate that contracts shall be made for increased compensation contingent upon obtaining a State appropriation. And outside of any statutory provision on the subject, it is my opinion that a conditional contract of the kind submitted is contrary to public policy.

SCHOOL FUNDS—SHERIFF'S COMMISSIONS

June 3, 1926.

I have your letter of May 31, sending letter of Mr. A. C. Deal, Chairman, Board of Education, Alexander County.

By Chapter 580, Public-Local Laws of 1923, county officers of Alexander County were put upon salaries. By section 12 of that act, the officers are required to collect and account for all fees, commissions and profits earned by these officers. By section 15 it is made a misdemeanor for an officer to fail or refuse to collect such fees and commissions. Section 16 directs that these fees and commissions shall be paid into the general fund of Alexander County.

Clearly, then, the law contemplates that the sheriff shall collect and receive the commissions at the usual rate upon all taxes collected by him—that is to say, he shall retain from all taxes so collected the commissions which he would otherwise have received but for the passage of this salary act, and that the sum represented by these commissions so collected by

him shall be paid into the general fund of the county. There is no exception as to the school taxes. He is, therefore, acting correctly in paying over the commissions from the school taxes into the general fund.

In making up the budget, the amount of these commissions should be estimated as an expense and the budget made so as to produce a net sum inclusive of the commissions.

By section 189, school code of 1923, the commissioners are authorized to borrow money for the running of the six months school term when the estimated budget fails to produce the required amount. It is further provided that it shall be the duty of the commissioners to levy sufficient taxes in the succeeding year to take care of the sum so borrowed. These are the principles and the law upon which the two boards should proceed.

CONSOLIDATION—73-A FOLLOWED

July 23, 1926.

You have sent to this office letters addressed to your office by H. J. Brown, John E. Vann and N. W. Britton in relation to the Union Tax District and the Winton Township School District. The question arises out of the fact that the Winton Township in Hertford County was consolidated into a school tax district. Previous to this consolidation the Union Tax District had been created and this included in its bounds part of St. John's Township and Winton Township. The effect of creating this consolidated district, then, in Winton Township was to take that part of Winton Township which had theretofore been consolidated with part of St. John's Township into the Union Tax District and attach it to the Winton Township School District. The Union School District had been for some years levying a special tax upon the whole district which, of course, included a part of Winton Township.

These letters seem to require from this office a determination of the question as to the effect of this more recent consolidation of the schools in Winton Township upon the special tax levied upon the property owners in that part of Winton Township which theretofore had been attached to the Union School District. Your communications to the parties heretofore have carried the question further back than this and require, therefore, a determination of the question whether or not the more recent consolidation of all the schools in Winton Township into one school district is legal. Of course, if it is determined that this consolidation is legal, no special school tax could be levied upon that part of the taxpayers who are taken out of the Union School District for the support of that district, they having been legally attached to the new district, which also has voted a special tax.

The county-wide plan of organization provided in Sections 73-a *et seq.* of the new school code was intended to be administered by the county board of education in the manner set out in those sections. There is an express prohibition against the erection of a new school district or the division or abolition of an existing school district except in accordance with that county-wide plan. The letter of Mr. Britton encloses copy of the

minutes of the school board of education, which shows that that board did not follow the method provided in section 73-a of the new school code. That contemplated the creation of new school territorial units by carving them out of old territorial units or by consolidation of these old territorial units. If the proper plan had been adopted, then, there would not have been taken from the Union School District part of its territory and attach it to the new territorial unit, to wit: Winton Township, without the rest of Union School District having been provided for by its attachment to the new territorial unit.

For these reasons it appears that the county board of education transcended its power in failing to regard the mandatory provisions of section 73-a when they attempted to create this Winton Township School District. The consequence of this holding is that there is no such new school district; that the special tax levied therein is invalid; that the part of Union School District attached to it remains still a part of Union School District, and that the special tax provided for Union School District is still to be levied upon the property of residents in that district and used to conduct the schools in the Union School District.

There may be in the statement of facts which we have attempted to make from the letters sent to you some error that may be cleared up by the educational authorities of Hertford County. If their inference is correct, the legal deductions therefrom necessarily follow.

SPECIAL TAX—LIMIT VOTED

August 4, 1926.

You state in your letter of August 4 that in Edgecombe County there is a school district which has issued serial bonds under the general law. When the bonds were issued, the maximum rate of 25 cents was voted to take care of the interest and principal as they become due annually. It has been found since that this rate of 25 cents will be insufficient to take care of a certain number of the later payments as they become due. Upon this statement of facts you inquire (1) whether or not this rate of 25 cents can be increased in order to discharge the remaining payments of interest and principal when they become due; and (2) if this levy cannot be exceeded, whether or not the maximum rate could be levied now and a sinking fund provided by the amount not needed at present to take care of the interest and principal payments at the time when the 25 cent rate will not be sufficient when levied annually to take care of the annual payments.

(1) The 25 cent rate having been voted as the limit beyond which the tax could not be levied, it cannot be exceeded by the levying authorities. It has recently been brought to the attention of this office that quite a number of special tax districts in the State have tax rates thus limited though they are to raise funds to pay bonds. Mr. Masslich, of New York, has suggested that hereafter the tax rate should not be limited in the Act permitting the levy, but authority should be granted to the taxing authorities to levy sufficient tax to pay the annual interest on bonds and to

provide a sufficient sinking fund to pay the bonds themselves at their maturity.

(2) We think it is not only legal but positively incumbent upon the taxing authorities, under the conditions stated above, to levy the full amount, 25 cents, each year, though not immediately required to meet accruing payments at present, and to use the excess as a sinking fund to meet payments accruing hereafter for which the annual levy of 25 cents would not provide sufficient funds. Of course the safety of this sinking fund must be secured by adequate provision for its management by the authorities upon whom is placed the duty of paying these bonds as they serially become due. The controlling obligation upon the sale of bonds such as these is to pay them when they become due. If, therefore, by the scheme suggested these payments could be made, whereas without it they could not be made, we think the authority to adopt it is clear.

STATE INSTITUTIONS—DIRECTOR

August 16, 1926.

I have your letter of August 6. You state that Mrs. R. J. Reynolds of Winston-Salem was appointed a member of the board of directors of N. C. College for Women and that her term would have expired in 1928. Mrs. Reynolds resigned. The State Board of Education in 1923 appointed Mrs. George W. Watts (later, Mrs. Cameron Morrison) of Durham to fill out the unexpired term of Mrs. Reynolds. At the time of the appointment Mrs. Morrison was a resident of the Fifth Congressional District, but later she moved to Raleigh, in the Fourth District, and still later to Charlotte, in the Ninth District.

Upon this state of facts you ask my opinion as to whether Mrs. Morrison is still a member of the board of directors of this college.

The statute on the subject is II C. S. 5834, the apposite part providing:

The corporation shall be managed by a board of ten directors, no two of whom shall be chosen from the same Congressional District.

The intent of the act is to distribute the members of these boards throughout the various sections of the State. It, therefore, requires that not more than one shall be "chosen" from the same Congressional District. The word seems to have been selected with aptness to meet such a situation as the one set out in your letter.

I am of opinion that while the selections must be from different Congressional Districts, yet removal of a director from one district to another does not thereby operate to vacate the office. So long as a director remains a citizen and resident of the State, he or she will continue to hold office, although there may have been removal from one district to another.

I, therefore, advise that Mrs. Morrison is still a director of the college.

CONSOLIDATED DISTRICT—LEVY OF TAX

August 17, 1926.

It appears from letter of Mr. B. C. Sisk to you that the board of education of Duplin County, apparently acting under 73(a) of the school code, consolidated five school districts in Duplin County, of which number was the Beulaville School District. In the latter district a rate of 30 cents had been voted. In the other districts there was no special tax. The effect of the consolidation was to eliminate the 30 cent tax entirely.

An election was held on July 20 in the consolidated district and a tax of 30 cents was carried for this consolidated district by a large majority. However, on July 13, previous to the election but assuming that it would be properly carried, the board of commissioners levied a special tax of 30 cents on the \$100. You inquire whether or not this tax so levied on the 13th of July is a legal tax.

We deem it unnecessary to inquire into the further answer to this question for if the board of commissioners reconvene, they may clearly levy the tax of 30 cents in the consolidated district under section 41 of the Machinery Act of 1925. This would avoid all question of illegality.

OPINIONS TO THE CORPORATION COMMISSION

BANKS—INDUSTRIAL POWERS

January 23, 1925.

You ask an opinion from this office as to whether or not an industrial bank organized under chapter 225 of the Public Laws of 1923 may in its certificate of incorporation include authority to do an insurance agency business, a fidelity bonding business, or a real estate business. The question is not free from doubt, but after consideration of the matter we are quite clearly of the opinion that this cannot be done. The General Assembly evidently intended to confer special privileges upon these industrial banks in order that they might successfully do the business for which they organized, that is, lending small sums of money to individuals to be repaid in weekly, monthly or periodical installments. They are required to organize specifically under the Act of 1923 with the powers and limitations contained in that act. It is true that the certificate of incorporation is issued by the Secretary of State under the general corporation laws of this State, but when the statute itself in section 6 comes to deal with the powers of these industrial banks, in addition to those specifically set out in section 6, it grants them the general powers conferred upon corporations formed under the chapter on corporations. The use of the term "general" in that connection does not, of course, include a specific power which might be conferred under the chapter on corporations, but only those set out in general terms in section 1126 of Chapter 22 of the Consolidated Statutes. These general powers so set out are, of course, limited by the specific provisions of the industrial bank act.

These reasons which we gave to you several weeks ago orally are now sent to you as a formal opinion of this office, in accordance with your request.

BANKS—REAL ESTATE INVESTMENT

February 23, 1925.

You ask the opinion of this office as to whether the Corporation Commission has authority under section 30, Chapter 4, Public Laws 1921, to suspend the limitation of investment of a bank in the stock or bonds of a corporation owning the land, building or buildings occupied by such bank as its banking home. We are quite clearly of the opinion that the Commission has not this authority. We might put this ruling upon the wording of section 30 without further discussion. The limit of the loans and investments which section 30 contemplates the Corporation Commission may temporarily suspend are essentially temporary loans and investments. The authority to suspend these limitations, then, is to meet a temporary condition arising from the necessities of the particular case. An investment, however, of fifty

per cent of the bank's capital and permanent surplus in the stock or bonds of the corporation owning the building in which it is located, can be in no sense a temporary investment. It is essentially permanent in its nature and the General Assembly in such investment has itself fixed a limit beyond which the bank cannot go. It is apparent, we think, that the wording of section 26 lends force to this view. The statute there permits the investment by a bank of fifty per cent of its paid-in capital stock and permanent surplus in real estate such as shall be necessary for the convenient transaction of its business including furniture and fixtures, with its banking offices and other departments to rent as a source of income. There is no permission to the Corporation Commission either in section 30 or any other section of the act to suspend this limitation. The reason, of course, is because this is a permanent investment and not a temporary investment. It is true that the other provision fixing a limit of fifty per cent on investments in the stock or bonds of the corporation owning the land and building occupied by the bank is contained in section 27 and that section is included in section 30 as one which may be modified by the Corporation Commission. For the reasons above stated, however, we interpret that as an exception to the general provisions of section 27 and those general provisions are sufficient in themselves to justify an interpretation which permits the Corporation commission under section 30 to suspend the limit, those investments being in themselves such as no fixed rule could be made to apply to them without injustice in special cases.

MOTOR BUSES—INSURANCE POLICIES

April 8, 1925.

I have your letter of April 6th with respect to bond or insurance policy required of automobile carrier operating in Virginia and North Carolina. The bus regulation act requires that these bonds or policies should be filed with your Commission. The Commission would have no authority to release any particular person from the obligation to do this.

It occurs to me that you might handle the matter by having duplicates of the policy filed with each State covering the same operation.

BANKS—DIRECTORS—OFFICERS

April 11, 1925.

You ask a ruling of this office as to whether or not a bank director is an officer within the meaning of the recent act of the General Assembly regulating the borrowing of money by officers and employees. That act is in the form of a substitute section 62 to section 2 of the banking law of 1921, Chapter 4, Public Laws thereof. The act is as follows:

Sec. 62. *Officers and Employees May Borrow When*—No officer or employee of a bank, or a firm or partnership of which such officer or employee is a member, nor a corporation in which

such officer or employee owns a controlling interest, shall borrow any amount whatever from the bank of which he is an officer or employee, except upon good collateral or other ample security or endorsement; and no such loan shall be made until the sum has been approved by a majority of the board of directors and a resolution duly entered upon the minutes of the board of directors and signed by them, showing the amount of the loan, the directors approving the same and a brief description of the security upon which said loan is made; and a certified copy of such resolution shall be attached to the instrument evidencing the indebtedness.

It is true, this act would have room to operate without including directors in its terms, as the cashier, teller, president and vice president are certainly officers of the corporation. We have never heard it doubted before, however, that a director of a bank is an officer of the bank. There is not a single textbook which we have examined that did not include in the officers of the bank its directors. Certainly, these directors are within the evil which the statute was intended to cure and there is no reason why their right to borrow from the bank should not be as limited as that of the other officers and employees of that bank.

See as illustrating the last clause of this letter:

Tate v. Bates, 118 N. C., 287.

Solomon v. Bates, 118 N. C., 311.

Caldwell v. Bates, Id., 323.

Houston v. Thornton, 122 N. C., 365.

Besseliew v. Brown, 177 N. C., 65.

BANK—ASSESSMENT—STOCK

May 22, 1925.

The stock sold by the Elon Banking and Trust Company in order to meet an assessment levied by its board of directors upon the stockholders of that institution, if validly sold, was manifestly canceled by the direct provision of the act:

A sale of stock as provided in this section shall effect an absolute cancellation of the outstanding certificate or certificates evidencing the stock so sold, and shall make the certificate null and void, and a new certificate shall be issued by the bank to the purchaser of the stock.

In order to carry out the purpose of the act, it seems necessary that this new certificate should be issued and that the old certificate should be canceled upon the stock book of the bank at the same time.

BANK—INDUSTRIAL—INCORPORATION

November 6, 1925.

In the Matter of the Certificate of Incorporation of the Greensboro Finance Corporation

The letter of Mr. B. B. Vinson to you which accompanies this certificate has been held up for several days, awaiting the return of the Attorney General, but as he has been quite unwell and is still sick, and will not be here this week, I am undertaking to advise you upon the matters involved.

Mr. Vinson seems to think that this is a proper certificate of incorporation for an industrial bank. I think that he is mistaken in that the industrial bank act as amended at the recent session of the Legislature makes an industrial bank an institution of its own kind. It is to be incorporated under the industrial bank act. Whether or not it is necessary to use the term "industrial bank" in the charter has not been presented for determination. Section 3 of the Act of 1923, however, declares:

Every corporation incorporated or reorganized in pursuance to the provisions of this act shall be known as an industrial bank.

and may use the word "bank" as part of its corporate title. This does not seem to exclude the use of a name which does not include specifically "industrial bank" in it. An industrial bank as now organized, however, can exercise only the powers specifically conferred upon it in section 6 of the act, and is subject to the restrictions and limitations contained in section 7. No additional powers are conferred upon it except the general powers set out in C. S. 1126. These banks have also to be applied to them the double liability of their stockholders.

The name and character of them having thus been modified by recent legislation, it is entirely clear, we think, that they are banks when properly organized within the meaning of the first clause of section 28 of the banking law:

No bank shall make any investment in the capital stock of any other state or national bank.

The reason for this prohibition in section 28 is largely to be found in the double liability of stockholders in banking institutions. If Mr. Vinson desires to incorporate the Greensboro Finance Corporation, he can do so under the general corporation law, not, however, as an industrial bank but as a commercial corporation. When that is done under section 28 of the banking law, the Greensboro Bank and Trust Company may invest fifty per cent of its permanent surplus in its stock.

INTERSTATE COMMERCE—PULLMAN SURCHARGE

November 24, 1925.

I am in receipt of your recent letter sending report and order of Interstate Commerce Commission of October 6, 1925, "In re Surcharge for transporta-

tion of passengers in sleeping or parlor cars between points in the State of North Carolina." You ask my opinion as to whether any further action should be taken by the Corporation Commission in this matter.

It appears that this surcharge became effective on interstate travel on August 26, 1920, and by permission of the Corporation Commission on intrastate travel in North Carolina on September 15, 1920. It was abolished on intrastate travel by Chapter 147, Public Laws of 1923.

On March 20, 1923, the carriers operating in North Carolina filed a petition with the Interstate Commerce Commission asking for an investigation of the situation under section 13 of the Interstate Commerce Act. That section of the act as amended by the Transportation Act of 1920 authorizes the Interstate Commerce Commission, after a prescribed investigation, to remove

Any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce.

The Commission conducted the investigation, the North Carolina Corporation Commission being represented. In its decision of October 6, 1925, the Commission reports that the non-application of the surcharge on intrastate travel reduces the revenues of railroads operating in the State of North Carolina by approximately \$75,000 per annum; that the rates in intrastate transportation are lower than the corresponding interstate rates for similar service under similar conditions as are authorized by the Commission; and that such intrastate rates are unduly preferential of intrastate passengers, unduly prejudicial of interstate passengers and unjustly discriminatory against interstate commerce. It, therefore, ordered the reimposition of surcharges on intrastate travel.

Other states have had an experience on this subject practically similar to that of ours. In every instance where the matter has been taken before the Interstate Commerce Commission, the order of that body has been adverse to the contention of the state and it has uniformly directed the imposition of the surcharge on intrastate travel. My information is that following these decisions of the commission the surcharge is now in force in practically every state.

In the Minnesota rate cases, 230 U. S., 351, and the Shreveport case, 231 U. S., 342, the Supreme Court of the United States held that Congress through the Interstate Commerce Commission might control intrastate rates to the extent necessary to remove any unjust discrimination against interstate commerce arising out of the relation between such intrastate rates and interstate rates which are reasonable in themselves. The power to exercise this control was conferred upon the Interstate Commerce Commission by the Transportation Act of 1920 by more direct and specific language than that contained in the original Interstate Commerce Act considered in the Shreveport and Minnesota cases.

The amendments of 1920 were considered by the Supreme Court in the Wisconsin rate case, 257 U. S., 563, decided February 27, 1922. The Interstate Commerce Commission had ordered an increase in interstate rates

for the carriers in the group of which the Wisconsin carriers were a part of 35 per cent in interstate freight rates, 20 per cent in interstate baggage fares and a surcharge of 50 per cent on Pullman fares. The carriers applied to the Wisconsin Railroad Commission for corresponding increases in intrastate rates. That commission granted the increase as to freight rates, but denied it as to passenger fares and Pullman surcharges.

The carriers then appealed to the Interstate Commerce Commission and that Commission found that the lower rates on intrastate travel would result in undue, unreasonable and unjust discrimination against persons traveling in interstate commerce, and against interstate commerce as a whole, and ordered that this undue discrimination should be removed by increases in all intrastate passenger fares and by surcharges on Pullman fares corresponding with the increases and surcharges in interstate business.

On appeal to the Supreme Court of the United States that court sustained the Interstate Commerce Commission in its finding that the intrastate rates prescribed by the Wisconsin Commission were an undue discrimination against interstate commerce as a whole, and held that the Commission was authorized to remove the discrimination by making the order increasing intrastate passenger fares and imposing a surcharge on Pullman fares so as to bring such intrastate rates and surcharges to the level of those fixed for interstate travel.

At the same term the Supreme Court decided the New York rate case, 257 U. S., 591. The facts in that case were almost exactly similar to those in the Wisconsin case. Again the Supreme Court sustained the Commission in its order requiring an increase in passenger fares and the imposition of the surcharges on Pullman fares so as to bring such fares and surcharges to the level of the interstate rates. In both of these cases intrastate passenger fares had been fixed by a statute, as is the case with respect to passenger fares and surcharges on Pullman fares in this State.

There are other cases in which the Supreme Court has sustained the actions of the Interstate Commerce Commission under the Interstate Commerce Act as amended by the Transportation Act of 1920. In all of them the Court has rendered decisions in harmony with those herein considered.

The Corporation Commission could pursue the matter further by bringing an action in the United States District Court against the United States and the Interstate Commerce Commission, asking that the order imposing the surcharge be annulled and for an injunction to prevent its enforcement. From my examination of the subject, I reach the conclusion that it will be useless to do so and that the Supreme Court would sustain the action of the Commission in making the order submitted for my consideration.

CAPITAL ISSUES ACT—BOND OF SELLER

April 1, 1926.

In reply to yours of March 30th. Section 11 of the Capital Issues Act, Chapter 190, Public Laws of 1925, provides for the registration of qualified securities in the office of the Commissioner. Among other provisions contained in section 11 is that in subsection 3, which requires the applicant

for the registration of securities to execute a bond of not less than \$1,000 nor more than \$100,000 in the discretion of the Commissioner, said bond being payable to the State of North Carolina and being conditioned upon the truth of the statements set forth in the application and also the truth of the statements set forth in all literature or advertising matter used in connection with the sale of such securities, etc. Subsection 3 proceeds:

Said bonds shall be made with a surety company authorized to do business in the State of North Carolina and shall be filed with and approved by the Commissioner.

Upon this you inquire whether or not in the opinion of this office this provision in regard to the bond would be complied with if the applicant after executing the bond should deposit with your office bonds of the United States or the State of North Carolina in lieu of the surety bond of the statute.

The object of giving the bond is to supply those who are injured by the falseness of any of the statements of the applicant with adequate security for the damages which they may incur by reason of such falseness. It is manifest, speaking generally, that a deposit of money in lieu of the security required would be security of as high a nature or even higher than the surety bond itself. The same rule would apply to stable securities as bonds of the State of North Carolina or bonds of the United States. Indeed, such security would be more effective than the surety bond if the deposit was accompanied by a power of attorney to your office to deal with these securities in case there would be a breach of the bond in such way as to indemnify the person injured by such breach.

There are practical difficulties, however, in adopting this course which might render it inadvisable to permit such deposit. The statute so far as we have been able to ascertain makes no provision for the safe keeping of money or stable bonds deposited with you. A registered United States or State bond, of course, does not require such active vigilance in their safe keeping as would an unregistered or coupon bond of the same class, or money deposited with you. For this reason it seems that the Legislature meant what it said in requiring the bond to be made with a surety company authorized to do business in the State of North Carolina.

OPINIONS TO THE COMMISSIONER OF AGRICULTURE

COTTON WAREHOUSE ACT—MAINTENANCE FUND

January 29, 1925.

You state under date of January 28th that you saved from the operating account under the State Warehouse System, Chapter 138, Public Laws of 1921, surplus funds which you desire to carry to the principal fund in order to complete some loans heretofore approved, and ask if you may do this.

The purpose of this act is to provide improved marketing facilities by the establishment of warehouses for the storage of this product. The act provided for the collection of 25 cents on each bale of cotton ginned in the State during a specific period, and directed that not less than 10 per cent of the amount so collected should be invested in bonds of the United States, bonds of the State of North Carolina, or farm loan bonds, and that the remainder might be invested in amply secured first mortgages on cotton warehouses, such loans to be for not more than one-half the actual value of the warehouse property covered by such mortgages. The act further provides that the interest received from these investments shall be available for the administrative expense in carrying out the provisions of this act. I assume that the interest so collected is being carried by you in what you refer to as the operating account and that you wish to know if any part of this operating account may be carried to the principal fund and used in making the loans contemplated.

I advise that this may be done. The main purpose of the act is to make these loans for warehouse purposes. While the interest received may be used for the administrative expense, any saving effected properly belongs to the principal fund and should be used for the main purpose as set out in the act.

COTTON WAREHOUSE SYSTEM—EMPLOYEES' BONDS

March 13, 1925.

We have carefully considered your letter of March 10th, with enclosures, and see no sufficient reason why the approval of the former Attorney General of that bond should not be continued. You state that at the beginning of this season you put into effect a schedule form of bond, that is, a single bond to cover the activities of all local managers of warehouses operating under the provisions of the State Warehouse Act. Your authority to do so is contained in the latter clause of Third Consolidated Statutes, Section 4925(d). That clause is as follows:

The superintendent shall, to safe-guard the interest of the State, require bonds from other employees authorized in section 4925(c) in amounts as large at least as he may find ordinary business experience in such matters would suggest as ample.

The object, of course, of this bond is to secure the fidelity of such employees. The method which you have adopted may be stated thus shortly: The bonding company executes a fidelity bond in the penal sum fixed by you to secure the fidelity of each local warehouse manager in the schedule attached to the bond in the amounts for each set opposite the name of each local manager in said attached schedule. These local managers did not sign directly and specifically the surety bond executed by the United States Fidelity and Guaranty Company. On its face, then, without anything further, this is a bond executed by the surety without the principal signing the bond. Technically, this prevents it from being strictly a bond. It is, however, technically and otherwise, a valid and enforceable undertaking against the surety company. It is clear law that a bond, as well as any other contract between two parties, may incorporate in it provisions contained in another paper by reference thereto. In the particular case the schedule attached to this bond is as much a part of the bond as what is written upon its face, for it is made a part by a particular reference. Whether or not, then, under the circumstances this is technically a bond, is not specially material, because its object is to secure the fidelity of these various local managers and the surety company is as much bound by this undertaking so written as it would be had the principal or principals signed the particular paper involved. You have, then, all the security which the statute requires and to which you are entitled. If the surety company (in this instance the United States Fidelity & Guaranty Company) adopts this form and safeguards it as it does in the printed form of application which you include with the papers, it cannot be heard to say that it is not bound by this undertaking to the full extent of what is set out in it and the attached paper. Thus you secure as much protection for the System as you would had this been a formal and technical bond.

TICK ERADICATION—SERVICE OF NOTICE

April 25, 1925.

Section 7 of Chapter 146, Public Laws, 1923—the tick eradication act—requires notification by some quarantine inspector of the owner of cattle to have such cattle, etc., dipped regularly every fourteen days. The statute does not prescribe that the notice shall be written, though your Department very properly has always given written notice. You inquire whether or not, in the opinion of this office, such written notice left at the home of the owner of cattle during his absence with some person of suitable age and discretion, such as his wife, is sufficient notice. We think that it is. C. S. Section 916 declares that a notice upon a party may be served by leaving a copy of the paper at his residence between the hours of 6 a. m. and 9 p. m. with some person of suitable age and discretion. Leaving notice with his wife is sufficient. *Turner v. Holding*, 109 N. C., 182. Service of case on appeal in a criminal case in this way was approved in *State v. Price*, 110 N. C., 599.

INSPECTION OF FARM PRODUCTS

May 14, 1925.

In the shipment of lettuce and other truck from Wilmington, there has been some difficulty experienced by your inspectors in attempting to obey the act of 1919, now incorporated in C. S. as sections 4781 to 4793, inclusive. The particular point at which objection has been made to the authority of these inspectors is their right to inspect these farm products which are packed for sale in other states. The right of inspection by the State was expressly reserved to the State in the United States Constitution, article 1, section 10, clause 2, which is as follows:

No state shall, without the consent of Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws.

As early as 1824 the United States Supreme Court recognized this reservation of right in the states in *Gibbons v. Ogden* and *Brown v. Maryland*, the opinion in both cases having been delivered by Chief Justice Marshall. The following are a few of the cases in that tribunal which have reaffirmed this salutary doctrine:

Turner v. Maryland, 107 U. S., 38.
Coal Co. v. Louisiana, 156 U. S., 590.
Potapsco Guano Co. v. Board of Agriculture, 171 U. S., 345.
N. Mex. v. Denver, etc. R. R. Co., 203 U. S., 38.
Aspell v. Kans., 209 U. S., 251.
Rec. "C" Oil Co. v. N. C., 222 U. S., 380.
Foote v. Maryland, 232 U. S., 494.
Pure Oil Co. v. Minn., 248 U. S., 158.
Texas Co. v. Brown, 258 U. S., 466.

The general rule is stated thus in the *Pure Oil Company* case:

In the exercise of its police power, a state may enact inspection laws which are valid if they tend in a direct and substantial manner to promote the public safety and welfare, or to protect the public from frauds and imposition when dealing in articles of general use *as to which Congress has not made any conflicting regulation*, and a fee reasonably sufficient to pay the cost of such inspection may constitutionally be charged, even though the property may be moving in interstate commerce when inspected.

The particular inspection provided in the sections of the Consolidated Statutes above referred to is intended to secure uniformity of classification, uniformity of quality, and also the prevention of fraud in the sale of these articles. Section 4785 contains the prohibition upon those packing for sale, offering to sell, or selling within this State any such farm product to which such standard is applicable unless it conforms to the standard. Then there is a proviso that permits this if it is especially described as "not graded" or plainly marked "not graded." The concluding clause of section 4784 declares that all rules established by the State for the standardization of farm

products or the marking of receptacles for these farm products must conform to those established under authority of the Congress of the United States.

Section 4789 prohibits inspectors from classifying or certifying to the grade of any farm product which is unwholesome or unfit for food of man or other animal. The first attack made upon the authority of your inspectors was that the State act by its own terms as used in section 4785 does not apply to farm products prepared or packed to be shipped in interstate commerce. The prohibition, however, is against packing for sale, against offering to sell, or against selling within this State. These are all in the alternative. So, in the opinion of this office the inspector is given authority under the State act to deal with and standardize farm products being packed or already packed for shipment in interstate commerce, such inspector having conformed to the standards and marks established by authority of Congress of the United States.

By the act of May 11, 1922, Chapter 185, 42 Stat., 532, section 828(a) of the Compiled Statutes, 1923, Congress provided for the investigation and certification of the quality and condition of fruits, vegetables, poultry, butter, hay and other perishable farm products when offered for interstate shipment. The Secretary of Agriculture is authorized to appoint these inspectors and to provide for proper certificates from them. As a matter of practice, each inspector appointed by the State Department of Agriculture acts also under an inspector's license issued by the United States Department of Agriculture. In making these inspections, then, the inspectors of your Department are also inspectors for the Federal Department of Agriculture. The authority of each one of them is, therefore, plenary to inspect and standardize farm products as well for extrastate markets as for intra-state markets.

The General Assembly at its session in 1921, section 4781, 3d C. S., added animal products also to farm and horticultural crops as contained in the original section 4781. Keeping in mind, then, the principle that State inspection laws dealing with the same subject are subordinate to those of the Federal Government, it seems that there ought not to be any practical or legal difficulty in carrying into effect the purpose of the act as stated in section 4781.

PURE FOOD ACT—LEMON EXTRACT

May 26, 1925.

In reply to yours of May 22d. We think that the first clause in your rules, which is as follows:

The label must be as far as possible attached to each package and contain in addition to other information the name of the material, the name and address of the manufacturer, importer or jobber

is to be construed as applicable to the unbroken packages in which the article is sold, whether by retail or wholesale. The object, of course, is to give the

immediate purchaser the information required. Taking lemon extract as an instance: the package in which it is sold to the consumer must have on it this label.

AGRICULTURAL BUILDING—DEBT—FUND FOR PAYMENT

June 3, 1925.

This office some time in 1924 advised the State Council, upon facts submitted to it by Dr. Brimley similar to those contained in his letter to you of May 28th, to borrow the \$15,090 in question now. The method adopted by the State Council under difficult circumstances such as presented with reference to this particular loan, is to pass a resolution authorizing the Department needing the money (in this instance the Department of Agriculture) to borrow the money and in the same resolution the State Treasurer is requested to negotiate the loan for that particular Department. We are informed that this was the procedure adopted by the Council of State in 1924. There is not, and has not been, any pretence that borrowing money under these conditions and under this machinery is legal in the sense that it is authorized by an existing statute. It has been the custom, however, for a number of years for this to be done in an emergency.

This particular \$15,090 was not provided for by the General Assembly of 1925 in the appropriation bill specifically, although a request was made of the appropriation committee to take care of this amount. After a critical examination of the act to permit the Governor and Council of State to authorize the State Treasurer to borrow money in an emergency, we find that an outstanding indebtedness of the character of this is not provided for therein. That act was intended to meet conditions where the General Assembly through inadvertence has failed to provide support for a particular department or institution in the general appropriation bill. The debt here was incurred in altering the plans for the erection of the Agricultural Building and this alteration was made by the State Board of Public Buildings and Grounds under the advice of competent architects. Consequently, we must, in order to determine what shall be done with this indebtedness, resort to the general fund note act of 1925. The object of that act was to fund all outstanding indebtedness of both institutions and the general fund so that the new fiscal year beginning July 1, 1925, will find the State with all of its indebtedness of every kind and description provided for, so that it can start the new fiscal year with a clean sheet, the object, of course, being to make expenditures fit the income of the State. We think, then, that this \$15,090 stated roundly, is to be provided for under this act. If it is not so provided for, it would remain an indebtedness of the State outstanding, uncared for, with that indebtedness at the same time bearing a rate of interest greater than the bonds which are to be sold under the general fund note act.

COTTON WAREHOUSE SYSTEM—SUPERINTENDENT

June 3, 1925.

Your letter of May 14th to the Attorney General was by him turned over to me for reply. If you will refer to a letter written by this office to Hon. Wm. A. Graham, Commissioner of Agriculture, of date July 17, 1924, you will find that the questions propounded in your letter have been largely answered. Section 2 of the act, now Section 4925(b), 3d C. S., places the general authority in the management of the Cotton Warehouse System in the Board of Agriculture. It authorizes this board to make and enforce such rules and regulations as may be necessary to make effective the purposes and provisions of this act. Section 4925 (e) requires the indemnity fund to be invested in amply secured first mortgages by the Board of Agriculture with the approval of the Governor and the Attorney General. No where in that section was this duty imposed specifically upon the State Warehouse Superintendent and no where in the act is the duty to collect the interest on this mortgage indebtedness and the principal when it becomes due imposed upon the State Warehouse Superintendent in specific terms. In consequence of this, we held in the letter of July 17, 1924, that the State Board of Agriculture might impose the duty of looking after these collections upon the Chief of the Division of Markets, Mr. Ross, by rule and regulation made to that effect. Wherever this is done by the Board of Agriculture it would relieve you of any liability as to the collection of sums so loaned, principal and interest. You are still, however, the chief executive officer of the System under the act and rules and regulations of the Board of Agriculture. The rule adopted by the Board of Agriculture only exonerates you from the necessity of looking after the collection of loans when they become due. The bumper between you, the public, and the State under such circumstances is the Board of Agriculture.

This is our interpretation of the act as written.

FERTILIZER—GUARANTEED INGREDIENTS

July 2, 1925.

I have examined the letter of Mr. W. G. Clark to you dated June 29th, and the accompanying papers, which show that two particular samples of fertilizer were short in necessary and guaranteed ingredients, the one 3.01 per cent and the other 4.45 per cent. It seems that Mr. Clark called the attention of the manufacturers of these fertilizers to this condition and requested them to send check for 80 cents per ton, a difference in the relative value as shown by the analysis of your Department. The fertilizer manufacturers refused to do this on the ground that they had a leeway of 5 per cent before they would be liable.

This is a misapprehension on their part of the law involved. These manufacturers are penalized under the statute if the deficiency is 5 per cent or more, but that is by way of punishment to them and not to compensate the purchasers of guanos from them. The printing on the back of the bag of

the contents and chemical value of the fertilizer is in itself a guarantee that the fertilizer in the bag comes up to these specifications. Any breach of this guarantee, therefore, subjects the manufacturer to a suit for damages on the part of the purchaser or consumer. This is entirely independent of the penalty which your Department may impose upon the manufacturer under conditions which give rise to that penalty. See letter to your predecessor, page 133, Biennial Report of this office, 1921-22.

The Supreme Court of North Carolina in *Tomlinson v. Morgan*, 166 N. C., 557, has adopted the view set out in this letter in regard to the liability of the manufacturer to the purchaser or consumer of fertilizer deficient in proper chemical food.

AGRICULTURAL DEPARTMENT—SALARY AND WAGE COMMISSION

July 2, 1925.

Replying to your recent request, I have to say that it is my opinion that your Department comes within the purview of the act creating a salary and wage commission. It, therefore, follows that this act supersedes the acts placing power in the hands of any other agency to fix salaries for the subordinates in your Department, and that such salaries are subject to the action of the salary and wage commission as set out in the act creating it.

TICK ERADICATION—RULES AND REGULATIONS

July 3, 1925.

Section 12 of the tick eradication act, Chapter 145, Public Laws of 1923, reads as follows:

The Commissioner of Agriculture, by and with the consent of the State Board of Agriculture, shall have full power to promulgate and enforce such rules and regulations that may hereafter be necessary to complete tick eradication in North Carolina.

Section 13, among other things, makes the violation of any rule or regulation so established a misdemeanor. In pursuance of this statute the Board of Agriculture under authority contained in Section 12, enacted Rule 9, which is as follows:

The State Veterinarian, his assistants, or any duly authorized quarantine inspector acting under the authority of the Commissioner of Agriculture shall have the right to enter or go into any barn, stable, pasture, railroad yard, pen, car, boat or other premises where domestic or other animals may be located, kept, or confined for the purpose of examining same, or otherwise discharging his duties as set forth in the Regulations of the Board of Agriculture or as directed by the Commissioner of Agriculture. No person, or persons, shall in any way interfere with, or obstruct him in the discharge of said duties.

You inquire upon this whether or not the Board of Agriculture had authority under Section 12 above referred to, to adopt Rule 9 as set out herein. It is very clear, we think, that this Board did have this authority. *State v. Hodges*, 180 N. C., 751. Section 5 of the tick eradication act of 1923 declares:

The State Veterinarian shall appoint the necessary number of local State inspectors to assist in systematic tick eradication, who shall be commissioned by the Commissioner of Agriculture as quarantine inspectors.

Now, the very term "inspector" carries with it the signification of a close or careful scrutiny. If the inspectors so appointed by the State Veterinarian can be stopped by every landowner at the borders of his land, it would be impossible for him to perform the functions imposed upon him by the statute in the eradication of ticks. The term "inspection" is derived from the Latin "*inspicere*," which means "to look into." So, though the statute itself does not in express terms permit the entry of these inspectors upon the premises of those alleged to have cattle infected by the tick, yet, when the statute is interpreted in connection with the authority of the Board of Agriculture to make rules and regulations, than it is entirely clear that those rules and regulations may define the duties and authority of inspectors appointed under the act and by virtue of the act to perform certain specified duties which are necessarily involved in the term "inspector" itself.

CROP STATISTICS—COUNTY OFFICERS

August 13, 1925.

Replying to your letter of August 10th, asking for an opinion with respect to Chapter 201, Public Laws of 1921, now III C. S. 4689(a) to (d), I have to say that in my opinion county commissioners have no authority or discretion to decide that the provisions of the act should not be carried into effect. No duties are required of the county tax supervisor under the act and therefore, failure on their part to perform the duties which are therein committed to the county auditor or register of deeds would not constitute a criminal offense.

Failure on the part of those of whom duties are required, that is, the county auditor, register of deeds and tax lister, is by the fourth section made a misdemeanor. I am unable to say that reports unsatisfactory to your Department would constitute a violation of the act. The punishment for misdemeanors is in the discretion of the court, limited, of course, by the constitutional provision that cruel and unusual punishment shall not be inflicted.

COTTON WAREHOUSE SYSTEM—WITHDRAWAL OF LICENSE

August 15, 1925.

In reply to yours of August 14th. You state that you find it necessary to refuse to relicense a warehouse under the State Warehouse System because the owner of the warehouse has permitted its roof to become leaky and refuses or fails to repair it. This leakage has already done damage to cotton stored in this warehouse. The present license expires August 31, 1925. You do not state the following in your letter, but we are assuming that all warehouse receipts indicate on their face that they are good only for the term for which the warehouse is leased and licensed. There are now about 150 bales of cotton in this warehouse with outstanding negotiable receipts for them in the hands of parties unknown, but each of those negotiable receipts has incorporated in it the provision that they are good only for the term for which the warehouse is licensed. We have examined the Cotton Warehouse Act of 1921 and do not find any direct authority therein to limit the negotiability of these receipts to the period of the expiration of the warehouse license. We assume, therefore, that this provision is contained in some rule or regulation of the Department of Agriculture made under authority contained in the act. You thereupon ask what you shall do in the premises in order to prevent the raising of any question by the holders of the receipts in case they are not surrendered before August 31st and the cotton taken over by the holders of those receipts.

We think that you should advertise the fact of the termination of the lease on August 31st in some paper published in the town in which the warehouse is located, notifying all holders of receipts that the State Guarantee Fund will not be liable after the cessation of the existing license, August 31st, and call their attention to this provision upon the face of their receipts. If this is done, it seems that you have done all that is necessary to protect the Guarantee Fund of the State from a subsequent call upon it by these holders of the outstanding negotiable receipts, particularly when they bear upon their face notice that their validity expires at the time of the expiration of the license of the particular warehouse in which the cotton is stored.

CROP STATISTICS—COUNTY OFFICERS

August 15, 1925.

You ask an interpretation of Chapter 201, Public Laws, 1921, now incorporated in III C. S. as Sections 4689(a) to 4689(d), with reference to the failure of registers of deeds or county auditors or tax listers to comply with this act. It is known as the Agricultural Statistics Act and it imposes upon these officials certain specific duties in regard to the obtaining of these statistics. It makes the failure of any of these officials to perform the duties set out in the act a misdemeanor. Upon this you inquire:

(1) When it is self-evident that less than one-half of the farms are reported for any township, does that constitute a violation of the act?

(a) Such failure would constitute pregnant evidence of the failure of the tax lister to do his duty properly in the premises, but it would not be a hard and fast rule.

(2) When no report at all is made for a particular township or when the books sent in are in such shape that no information can reliably be determined from them, does this constitute a violation of the act?

(a) This also is very strong evidence of the violation of the act. It would be exceedingly difficult for an officer to explain such dereliction in his duty.

(3) The fact that at the quadrennial period for listing and assessing property a county supervisor was appointed would not relieve the register of deeds or county auditor or tax lister from the performance of their duties under the statute, particularly in years in which there was no quadrennial assessment.

INSPECTORS—SALARY AND WAGE COMMISSION

October 9, 1925.

It seems under the statutes of North Carolina your Department has authority to appoint inspectors under the fertilizer act, under the pure food act, the pure seeds act, and the illuminating oils and gasoline act. Your Department, of course, comes under the salary and wage commission act, Chapter 125, Public Laws of 1925. That Commission is required to classify all the employees of the various departments and institutions of the State and fix the salaries and wages of each class or division. It is the purpose of that Commission so to classify your inspectors that they shall constitute one group, each inspector to have part in the performance of the duties of his office with relation to all the objects for which you have authority to appoint inspectors. The adoption of this scheme will result in the efficiency of these inspectors and prevent duplication of work in their duties.

We think this plan may be adopted and put into effect under the salary and wage commission act, but we advise that the salaries and expenses of not more than ten of these inspectors should be chargeable to the fund for the inspection of oil and gasoline.

EXPERIMENT STATIONS—EXECUTIVE

October 9, 1925.

In response to your inquiry, I have to say that the management of your experiment stations as provided in C. S. 4682 is in my opinion executive in its nature and, therefore, comes within the terms of chapter 174, Public Laws of 1925.

FERTILIZERS—STAMP ON BAG—LIME

November 14, 1925.

After considering the matter further, I see no reason to modify the old opinion given you in regard to the stamping on bags of fertilizers the fact that they contain a certain percentage of lime. It is true that section 4690 of the Consolidated Statutes requires certain essential elements in the fertilizer to be branded or printed on the bag or package. When the law is complied with in this regard, then it has been obeyed. It was not intended, however, to restrict manufacturers of fertilizers from including in their guarantee anything else as to the contents. Of course, printing upon the bag that it contains 30 per cent of lime is in itself a representation as to the quality of the fertilizer and like all representations, must be lived up to or else there would be fraud in the transaction, with all the consequences of such fraud.

In the matter of branding upon the bag or package the percentage of phosphoric acid in the fertilizer. The part of the statute of which Dr. Magruder desires a construction on this point is as follows:

In bone meal, tankage or other products where the phosphoric acid is not available for laboratory methods but becomes available on the decomposition of the products in the soil, the phosphoric acid should be claimed as total phosphoric acid unless it be desired to claim available phosphoric acid also, in which latter case the guarantee must take the form above set forth.

The form "above set forth" is No. 4—Available phosphoric acid,..... per cent. We think the interpretation of this statute is quite clear. There may be in a fertilizer a certain per cent of phosphoric acid which is available under the definition of the statute and a certain per cent of phosphoric acid which is available only on the decomposition of the products in the soil. The statute seems to give the fertilizer manufacturer an option to claim the chemical unavailable phosphoric acid as total phosphoric acid, while at the same time he may, if he pleases, claim also in addition to the total, the available phosphoric acid, the distinction being one class is available for laboratory methods and the other available only to natural methods.

If, therefore, the manufacturer stamps on his bag "Available phosphoric acid, so much" and wishes to show also the total phosphoric acid, the latter cannot include the former. Under the statute, then, if he states the contents of the bag "Available phosphoric acid, 13 per cent," and then because he has 1 per cent of unavailable phosphoric acid, he cannot state the latter as "Total phosphoric acid, 14 per cent." That is essentially misleading. If he does that, it means that there is in all both available and that which becomes available from decomposition of soil 27 per cent. It has total phosphoric acid within the meaning of the statute of only 1 per cent, yet the actual total would be 27 per cent instead of 14 per cent, as it should be. In other words, the manufacturer cannot include in his statement of total phosphoric acid the percentage of available phosphoric acid already stated.

In regard to fertilizer sold on time and with a greater charge than the 10 per cent above the cash price allowed by the statute. The so-called Bickett agricultural lien law, sections 2482 *et seq.* of the Consolidated Statutes is drawn so as to not prohibit absolutely the charging of more than 10 per cent but to penalize the person who does charge more than 10 per cent by the destruction of his lien. Where this charge is made, the lien is absolutely void as against the lienor and all other persons. So, if the law is offended against, it can be easily tested in the manner set out by the statute.

In the matter of tags or brands on bags. Mr. McCormick in his letter to you dated November 6th seems to contend that your Department has authority through some rule or regulation to modify the plain provisions of section 4690 of the Consolidated Statutes. That section declares in positive terms that the fertilizer manufacturer shall brand upon the bag or attach to the bag certain necessary requirements of that section. In another clause it says:

The several materials in each of these two classes shall be named on the bag or on a tag attached thereto.

Then, still lower down, in defining the items, it declares:

These items shall be branded or printed on the bag or package in the following order—

It seems plain, then, that the manufacturer may put these essential ingredients upon tags or brand them upon the bag. We find nothing in section 4703 which at all contradicts the provisions of section 4690.

AGRICULTURAL DEPARTMENT—JANITORS

December 23, 1925.

You request an opinion from this office as to whether or not the employees of the Agricultural Department, such as janitors, night watchmen, etc., are subject to the control of the keeper of the Capitol under Chapter 315, Public Laws of 1925. We think not, for two reasons: The Agricultural Department does not seem to be brought within the general terms of that chapter and there is no specific inclusion of it in the law. At the same session of the Legislature Chapter 174 of the Public Laws was enacted. That chapter clearly contemplates that you yourself have authority to select and appoint workers in your Department, free from the interference of any other persons.

PURE SEEDS ACT—FARMER

March 8, 1926.

The North Carolina seed law in its application to seed dealers without the State but offering to sell seed in the State, is founded upon the constitutional principle recognized by the United States Supreme Court as within

the power of the State in *Red "C" Oil Mfg. Co. v. N. C.*, 222 U. S., 380. In other words, it is essentially an inspection law and as such does not come within the prohibition of the Interstate Commerce provision of the Federal Constitution in the absence of direct action by Congress itself. The end of the act contains this proviso:

Provided, that nothing in this act shall be construed to require a farmer selling seeds raised by himself to comply with the provisions hereof.

You ask of this office a definition of the term "farmer" as thus used in the act. It is manifest that any one who makes a business of conducting seed farms and selling seed raised by himself in this way is necessarily a farmer. This proviso if it was interpreted as excluding such farmers from the act would kill the act itself. For this reason we think the proper definition of the term "farmer" used in the act is a man whose principal business is farming, with the selling of seed a minor and incidental part of his business. In order to prevent discrimination in favor of resident farmers, we think that a nonresident farmer of this class so limited would have the same right of exemption from the operation of the act as a resident farmer.

If you will examine the letter-head of the Harvey Sikes Farm, you will see that this Georgia concern does not come within the definition of "farmer" above set out. He runs what he calls "The famous Sikes Seed Farms." In other words, the production of seed is one of the principal parts of his business and the selling of seeds is not a mere minor incident, but practically the way by which he makes his farm productive.

LINSEED OIL—INSPECTION—A. C. L.

April 8, 1926.

In reply to yours of April 3d. The purchasing agent of the Atlantic Coast Line purchased linseed oil from the American Linseed Oil Company, Richmond, Va., and directed that it be shipped to that railroad at Wilmington, N. C. This oil was purchased for use in the shops of the Atlantic Coast Line at Wilmington. That company does not sell or offer to sell this oil. The oil itself was delivered direct to it at its own carrier in the City of Richmond.

Upon these facts you ask the opinion of this office as to whether or not it is subject to inspection under C. S. 4832 *et seq.* and to the inspection tax provided in section 4845. We think not. The whole transaction occurred out of the territorial limits of the State of North Carolina. There was a complete sale and delivery at Richmond, in the State of Virginia, and it was transported by the Coast Line to its own shops in Wilmington for its own use.

COTTON WAREHOUSE SYSTEM—INSURANCE AND STORAGE CHARGES

May 8, 1926.

It seems that one of the State licensed warehousemen has cotton on hand covered by State receipts which was deposited in his warehouse about five years ago and the depositor during that period has never paid anything for insurance or storage charges. Upon this you inquire whether or not the warehouseman can sell this cotton to pay such charges. We think he has authority to so sell. He should proceed, however, under C. S. Section 4073, following the machinery therein provided as strictly as possible.

TAXATION—SALE OF OLEOMARGARINE

June 15, 1926.

I have your letter of June 14th, inquiring as to whether this State levies a tax on the sale of Oleomargarine.

The only statute which I find indexed that refers to this article is II C. S. 5088, which is the statute requiring that it be labeled so as to show chemical ingredients. There is nothing on the subject in the Revenue Act. I, therefore, advise that the State does not provide for a tax on it.

LINSEED OIL—INSPECTION

July 6, 1926.

I have your letter of June 30th in which you inquire if linseed oil shipped into the State for manufacturing purposes is subject to the linseed oil inspection law and tax on the same. I advise you that such linseed oil is so liable to the inspection and the tax imposed.

Mr. Nash's reply of April 8th to yours of April 3d was based upon different considerations from those which obtained and stated in your recent letter.

COOPERATIVE ASSOCIATION—DIRECTORS

July 23, 1926.

In the Matter of the Incorporation of the Cooperative Bulb Growers Association of North Carolina

This association is being incorporated under Chapter 87, Public Laws of 1921. Subsection (b) of section 12 thereof requires the by-laws of the association to provide that one or more directors shall be appointed by the Director of Agricultural extension or any other public official or commission. What Mr. Tinga means, therefore, is that they want to appoint Mr. Ross as this director. The certificate of incorporation seems to be in proper form and no doubt will be perfected in the office of the Secretary of State.

OPINIONS TO INSURANCE COMMISSIONER

BLUE SKY LAW—OIL INTERESTS

September 12, 1924.

It appears that the Eastern Oil Land Syndicate, incorporated under the laws of Delaware, is, through an unincorporated association called the Carolina Syndicate—which has a place of business in the city of Raleigh—offering for sale interests in land located in Craven and Carteret counties, North Carolina, in quarter-acre lots. Accompanying the proposal to sell this land in quarter-acre lots is a collateral contract on the part of such oil land company obligating itself when it has acquired four thousand acres of land, to drill wells upon the land in search of oil. Naturally, the inducement to purchase these quarter-acre lots in this tract of land in Craven and Carteret counties is the promise to drill for oil. Upon this you inquire whether this unincorporated association selling these interests in land with the collateral agreement must be licensed under the Blue Sky law, and further whether or not the Blue Sky law applies to the situation above outlined in broad terms.

Preliminary to the discussion, we wish to call your attention to an error on the part of the compilers of the Consolidated Statutes of 1919 in placing the amendment to the Blue Sky law, contained in Chapter 121 of the Public Laws of 1919, at the end of Section 6363 of the Consolidated Statutes, instead of at the end of Section 6364, where it properly belonged. We think that this error of the compilers is not vital and that said Chapter 121 should be taken for the purpose of this discussion to be properly at the end of Section 6364. This section when thus amended, will read as follows:

6364. Foreign companies subject to regulation of this article. Every corporation, partnership, or association all of which are in this article termed company, organized, proposed to be organized, or which shall hereafter be organized, without this state, whether incorporated or unincorporated, which shall in this state sell, or negotiate for sale, any stocks, bonds, or other evidences of property or interest in itself or any other company, all of which are in this article termed securities, upon which sale or proposed sale the whole or any part of the proceeds are used, or to be used, directly or indirectly, for the payment of any commission or other expenses, incidental to the organization or promotion of any such company, shall be subject to this article. This section shall apply also to every corporation, company, co-partnership, or association organized or to be organized in this state where such company or organization by its organizers or promoters puts or proposes to put the stock of the company on the market in person or by agents.

Section 6363 was again amended by the General Assembly of 1923, Chapter 161, in the following particulars:

. . . The term "security" or "securities" shall include any note, stock, treasury stock, bond, debenture, evidence of indebtedness, transferable certificate of interest or participation, certificate of interest in a profit-sharing agreement, certificate of interest in an oil, gas, or mining lease, collateral trust certificate, any transferable share, investment contract, or beneficial interest in or title to property or profits, or any other instrument commonly known as a security.

It is evident, then, that this is a foreign corporation offering through this Carolina Syndicate agency the sale of a certificate of interest in what is alleged to be oil property, accompanied by an investment contract as stated in said Chapter 161. This, it seems to us, brings the transaction directly within the principle of *State v. Avey*, 171 N. C., 831. This company is offering the obligations of itself to drill the land sold for oil, and consequently, in the opinion of this office comes within the Blue Sky law, as do also its agents, the Carolina Syndicate.

TITLE GUARANTY INSURANCE COMPANY—INVESTMENT

March 6, 1925.

The Title Guaranty and Insurance Company has applied to you for authority to invest \$50,000 of its capital stock in preferred stock of industrial companies with a view to increase its income from such investments.

The statute, C. S. Section 6334, subsection 5, seems to be inartificially drawn, so it is difficult to arrive at its meaning without interpretation. That subsection permits such companies, after investing \$50,000 in United States, State, or municipal bonds, to invest, with the consent of the Insurance Commissioner, the balance of its capital stock in abstracts of title of property situated in one or more of the cities or counties of the State. The terms "abstracts of title" do not import in North Carolina anything more than the certificate of a competent examiner that he has examined the title of a particular tract of land and finds it as stated in his abstract. The transfer of these abstracts does not carry any lien upon the particular land itself. So, in the connection in which the terms are used in the statute, they are meaningless. If we should interpret them to mean first mortgages on real estate to the amount of one-half or two-thirds of its value, we should be enlarging the rules of construction beyond their legitimate scope.

Even if we should adopt this liberal interpretation and hold that abstracts of title mean first mortgages on real estate, it would do no good in the instant case, because the company is seeking means to transfer investments of this sort to another class which yields a larger income.

We think, however that the Insurance Commissioner has no statutory authority to permit the investment of the capital of these companies in the preferred stock of industrial enterprises. There is always, or nearly always, an element of practical uncertainty in the stability of the value of such stock.

DAILY DEPOSIT ACT—FUNDS OF DEPARTMENT

March 26, 1925.

I have given careful consideration to your letter of March 18th with respect to certain funds heretofore collected and administered by you, and advise you as follows in regard thereto:

The act known as the daily deposit bill provides that funds belonging to the State shall be deposited in designated depositories as therein specified. Section 5 of this act contemplates that certain funds shall be kept separate and separately administered by such departments, institutions, commissions or other agencies charged with their control, and that distribution sheets shall show the handling of these funds. It is apparent, therefore, that all funds coming to your office are to be deposited to the credit of the State Treasurer as required by the daily deposit act.

House Bill 1328, Senate Bill 780, provides that the collection of all "taxes, licenses, or fees, including any and all funds for the benefit of the State revenue" is transferred from your Department to the Revenue Department. The significant words here are "for the benefit of the State revenue." Construing the two acts together, it is apparent that the Legislature intended that all funds forming a part of the State revenue should be collected by the Commissioner of Revenue, but that the separate funds heretofore administered by any department and which do not form a part of the State revenue are not affected by the act transferring the collection of taxes to the Commissioner of Revenue.

Section 70 of the Revenue Act of 1925, in addition to levying taxes upon insurance companies, provides "that so much of said license fees collected from fire insurance companies as may be necessary shall be used by the Insurance Commissioner for the prevention of fire waste and accidents." All of these acts must be construed together and it will thus be seen that it was the intent of the Legislature to continue the work for the prevention of fire waste and accidents. Such sum as may be necessary for that purpose does not properly constitute a part of the taxes "for the benefit of the State revenue," and in my opinion should continue to be received and administered by you for that purpose. I, therefore, advise you that it will be proper for you to continue the collection of the fees under the quoted provision of this section and to use such portion thereof as may be necessary for the prevention of fire waste and accidents. Of course, any excess over the amount necessary for this purpose will remain in the State Treasury for general purposes.

C. S. Section 5186 provides that the proceeds of the annual license fee of \$25 required of domestic building and loan associations shall be used to defray expenses incurred by the Commissioner of Insurance in supervising building and loan associations. This is evidently such a separate fund as is contemplated by section 5 of the daily deposit act. It is my opinion that it does not form a part of the taxes "for the benefit of the State revenue" under section 5 of the act transferring the collection of taxes to the Department of Revenue. I, therefore, advise that your office should continue to collect these fees and use the proceeds as directed by C. S. 5186.

Section 48 of the Revenue Act of 1925 covers the licensing and taxation of lightning rod agents. By the provisions of this section it is made your duty to examine applications for the sale of lightning rods and to pass upon the issuance of licenses. Your duty with respect to that has not been changed by any of the recent enactments heretofore referred to. The fees to be paid by such concerns and agents as may be licensed to sell under this section become a part of the State or county revenue. I, therefore, advise that you should continue your duties under the first sub-section of that act with respect to the examination and licensing of such concerns and agents, but the taxes imposed by the section should be collected by the Department of Revenue.

C. S. 6318, subsection 6, provides for the collection by the Insurance Commissioner of a fee of \$9 from insurance companies licensed and operating in the State, to be used in the publication of the financial statement of the particular company. This fee would not be "for the benefit of the State revenue" as all of it is to be expended by the appropriate officer in paying for the publication therein required. I advise that you should continue to collect this sum, and it should be used as directed by the statute.

Chapter 98, C. S., entitled "Firemen's Relief Fund," provides for the collection of a certain sum therein specified which shall be by the Insurance Commissioner paid over to the treasurers of towns and cities having organized fire departments and to be used for the purposes in said chapter specified. This would be such a separate fund as is contemplated by section 5 of the daily deposit act. The sums received would form no part of the taxes "for the benefit of the State revenue." I, therefore, advise that you should continue to collect these fees and disburse them as provided in Chapter 98, and that it is not necessary that the sum so received should be collected by or pass through the hands of the Commissioner of Revenue.

Section 62 of the Revenue Act of 1925 provides for the taxation of building and loan associations. It directs that this tax shall be collected by the Insurance Commissioner and one-third paid over to the State, one-third to the county, and one-third to the city or town in which the association is located. A tax "for the benefit of the State revenue" is imposed by this section. It is my opinion that you should under section 6 of the act transferring the collection of taxes to the Department of Revenue, continue to determine the amount of the taxes due by each association, but that the taxes under this section should be collected by the Department of Revenue. Upon such collection that Department will divide the amount received between the State, county, and town in the proportions as therein set out.

Of course, the moneys so received by you as a part of the separate funds, as hereinbefore specified, should be deposited in accordance with the daily deposit act to the credit of the State Treasurer and the distribution sheets kept as provided by section 5 thereof.

APPROPRIATION BILL—WHEN EFFECTIVE

March 27, 1925.

This office has held that the appropriation bill goes into effect July 1st, and that it does not operate to repeal appropriations and statutes authorizing expenditures for necessary State administration covering the present fiscal year. You will, therefore, continue to operate under C. S. 6267 until the appropriation bill becomes effective.

RESIDENT AGENT

April 15, 1925.

You ask this office for an interpretation of the amendment by the General Assembly of 1925 to section 6302 of the Consolidated Statutes, particularly with reference to the provision that prohibits any salaried officer, manager or other representative of any company, unless a bona fide resident agent, to do or perform for or on behalf of his company any act which by the insurance laws of this State is required to be performed by a licensed resident agent. The whole of that section as amended is as follows:

6302. Resident Agents required; discrimination. All business done in this State by steam-boiler, liability, accident, health, livestock, marine, leakage, credit, plate-glass and fidelity insurance companies shall be by their regularly authorized agents residing in the State, or transacted through applications of such agents; and all policies so issued must be countersigned by such agents who may pay not exceeding fifty per centum of the regular commission allowed on the premiums collected on such business to a licensed non-resident broker. It shall be unlawful for any salaried officer, manager, or other representative of any company unless a bona fide resident agent to do or perform for or on behalf of his company any act which by the insurance laws of this State is required to be performed by a licensed resident agent. It shall be unlawful for the Insurance Commissioner to license as a resident agent any person unless he is fully satisfied that such person is a bona fide resident of this State, and is not being licensed for the purpose of evading the resident agents' law. No such companies nor their agents may make any discrimination in favor of individuals or insurants, and the provisions hereafter set forth in this chapter with respect to discrimination by life insurance companies shall apply to the companies above named and their agents.

C. S. sections 6298 and 6299 prohibit any agent or adjuster of any insurance company from soliciting business or doing business for that company in the State without having been licensed by the Insurance Commissioner.

C. S. section 6301 prohibits the licensing of nonresidents as insurance agents in the State.

The first clause of the above quoted section, 6302, requires that all insurance business of the character described in the section be done by regularly authorized agents residing in the State, and all policies issued must

be countersigned by such agents. When we come, then, to deal with the amendment of 1925, the prohibition in the preceding part of the section should be kept in mind. We interpret that amendment as prohibiting absolutely any salaried officer or manager from doing any act for his company which by the insurance laws of this State is required to be performed by a licensed resident agent. The terms "or other representative of any company" are broad enough to include agents of the company and other representatives not included in the class just mentioned, to wit: salaried officer, manager. The exception, then, qualifies only the clause "or other representative of any company," that exception being placed in immediate connection with those terms in the act.

Interpreted in this way, the amendment in legal and practical effect is as follows:

It shall be unlawful for any salaried officer or other representative of any company, unless that representative is a bona fide resident agent, to do or perform for or on behalf of his company any act which by the insurance laws of this State is required to be performed by a licensed resident agent.

FIRE WASTE—COMPENSATION OF COMMISSIONER

April 27, 1925.

Referring to our conversation a few days ago in regard to the subject of this letter:

The last clause of C. S. Section 6270 was enacted by Section 6, Chapter 506, Laws of 1905. Section 70 of the Revenue Act has in it a proviso as follows:

Provided, that so much of such license fees collected from fire insurance companies as may be necessary shall be used by the Insurance Commissioner for the prevention of fire waste and accidents.

This proviso was first incorporated in the Revenue Act in 1919. We interpret the proviso of 1919 as modifying the words of the last clause of Section 6270. So the compensation of the Insurance Commissioner is one-twentieth of one per cent of the amount set aside from the license fees collected from fire insurance companies for the prevention of fire waste and accidents. This is apparent from the last clause of C. S. Section 8101:

All public and general statutes passed at the present session of the General Assembly (1919) shall be deemed to repeal any conflicting provisions contained in the Consolidated Statutes.

We arrive at the result thus stated by construing the last clause of Section 6270 with the proviso in the act of 1919, permitting the latter to modify the former only to the extent necessary to make the two provisions intelligible.

FRATERNAL BENEFIT SOCIETY—GROSS RECEIPTS

August 17, 1925.

Your letter of August 13th to the Attorney General was by him referred to me for reply. It seems that the attorney of the Modern Woodmen of America, which is a fraternal benefit society, is contending that such fraternal benefit societies are not subjected to the gross premium receipts tax of section 70 of the Revenue Act. We think it quite clear that this contention has no substantial foundation. Section 70 classifies all insurance, bond and investment companies, associations or orders for the purpose of the annual license tax. It imposes a tax of \$25 on a fraternal order. This particular clause does not in specific terms allude to fraternal benefit associations. Even if it is admitted that this clause does not apply to associations, there is a subsequent clause which beyond any doubt includes them in its general terms, i.e., "for each license issued to all other insurance companies or associations, \$200."

Now, when the section comes to deal with the class of companies which shall pay the gross premium receipts tax, it is declared: "All of said companies, associations and orders shall pay a tax of $2\frac{1}{2}$ per cent upon the amount of their gross premium receipts in this State." Manifestly, this would include all companies or associations or orders upon which the annual license tax is levied in the preceding portions of the section. As, then, there is necessarily an annual license tax levied upon these fraternal benefit associations, they must also pay the gross premium receipts tax. The contention of the attorney of the Modern Woodmen of America, if allowed to prevail, would render the whole section unconstitutional as discriminatory against other similar associations and in favor of fraternal benefit associations. The North Carolina Constitution requires such taxes to be uniform upon the class to which they are made applicable.

FOREIGN COMPANIES—RECIPROCAL TAX

March 2, 1926.

You submit a request for the opinion of this office as to whether II C. S. 6413 provides for a reduction in the gross premiums tax levied by section 70, Revenue Act of 1925, upon a foreign insurance company to the level of such tax levied and collected upon North Carolina insurance companies by the home state of such foreign company.

I am unable to advise you that such reduction is provided for by our laws on the subject. Disregarding for the moment II C. S. 6413, I call your attention to the fact that section 70, Revenue Act of 1925, specifically sets out the rate of gross premiums tax which you are required to collect. In

view of that later enactment, you would have no discretion in collecting at a less rate than is therein prescribed. The rates in that section are the minimum ones at which you are permitted to collect.

For another reason, I am unable to advise you to collect at lower rates than those set out in section 70, Revenue Act of 1925. Your Department has uniformly followed that construction of II C. S. 6413 which permits retaliatory action on your part but does not permit the granting of lower rates than those specified in the statute on the subject. That action of yours has been with the approval of this Department under the administration of my predecessor. I am not disposed to reverse the opinion of the former Attorney General on the subject.

OPINIONS TO THE COMMISSIONER OF REVENUE

INHERITANCE TAX—CONTINGENT REMAINDER

September 29, 1924.

We have considered the question arising upon the inheritance tax to be paid by the ultimate legatees of Mrs. P. E. Gatling under her will dated February 13, 1912, and probated April 18, 1912, in Edgecombe County.

At the time this will was probated there was no machinery by which the interest of contingent remaindermen could be appraised, nor, indeed, is there now any such machinery. Mrs. Gatling devised all of her property to S. S. Nash as trustee to hold the legal title, while her husband, R. H. Gatling, was to control the said property largely at his will. In item 3 she provides that if her husband should marry again, and die, leaving a widow or child surviving him, then and in that event all the residue and rest of the estate remaining at the death of the husband was devised and bequeathed to such persons and in such way as her husband by his last will and testament might direct.

Mr. Gatling died in 1924, not having married a second time, nor did he leave a last will and testament appointing beneficiaries thereunder as permitted by his wife's will. The ulterior limitations contained in his wife's will upon the happening of all these events just recited vested in the persons designated by Mrs. Gatling's will. We think, therefore, that these contingent remainders having become vested at the death of Mr. Gatling, they are liable, each of them, to the proper inheritance tax thereupon. *State v. Bridgers*, 161 N. C., 247.

LICENSE TAX—ART FILM STUDIOS

October 15, 1924.

It seems that this corporation has domesticated in North Carolina and is doing business in the State. Stated shortly, and as we understand that business, this company manufactures films in Cleveland, Ohio, but has agents in North Carolina who interview merchants and others to secure from them a form of advertisement of their business which is to be projected upon the screens in the various moving picture shows in the city or elsewhere in North Carolina. This company charges the merchant or other business concern so much for such advertisement. They manufacture the films to be used in such advertisements at their studio in Cleveland, Ohio. After this manufacture, they make a contract with the owner of the particular theater at which they are to be exhibited, to pay him so much for the privilege of running these films upon his machine and of throwing the pictures upon his screen.

From this recapitulation it seems very clear that the Art Film Studios is not engaged in the business of manufacturing, selling or leasing films

used in moving pictures in the State of North Carolina and consequently, cannot have imposed upon it the license tax provided for in section 26 of the Revenue Act.

LICENSE—MIDGET DISPENSER

October 20, 1924.

You present two questions to this office, arising out of the use of the so-called "Midget Dispenser," manufactured by the National Soda Fountain Company of High Point, by soft drink vendors. This "Midget Dispenser" is described thus by Mr. Bogart in his letter of October 17th:

The Soda Fountain Company manufactures and sells to vendors carbonated water contained in a drum, the title and ownership of which is reserved by the company. This drum has two pipes or valves, and these are connected with a receptacle for two syrups, also provided by the company, and with the carbonated water drum. The vendor has a siphon on his table, and the carbonated water in the drum after the faucet is turned, rushes out into the glass which the consumer is to use, with the syrup already mixed by the machinery provided by the company. The company does not sell the receptacle for the syrup nor the drum containing the carbonated water. The vendor notifies the company when these are about to become exhausted, and it sends and substitutes another drum and another receptacle for the syrups. What money the company makes, then, is derived from the profits in the sale of the carbonated water and the syrups, whereas, the vendor's profit is derived from the consumer who drinks from the glass filled from the siphon.

We think that the company itself is taxable under section 57 of the Revenue Act as a manufacturer of soft drinks. Whether or not the vendor of the drink thus prepared by the company is also taxable under section 67 of the Revenue Act, is a more difficult question. That section taxes in reality the operation of a soda fountain. A simple siphon connected as the siphon operated by the vendor is with this drum and the receptacle for the syrups, is more like a sale of the same kind of drink from sealed bottles, than a dispensing from a soda fountain. Section 67 levies a license tax on the business of operating a soda fountain. In order that these vendors should be taxed under that section, it must be held broadly that any dispensing of soft drinks through a siphon is operating a soda fountain. It is, therefore, under the statute largely a question for the determination of the Commissioner of Revenue under section 903-a of the Revenue Act. Although section 67 in its title appears to levy a tax upon vendors of carbonated drinks, yet in reality it does not levy such tax upon vendors. This section was first incorporated in the Revenue Act in 1913 and was in the form in which it is now set out in the Revenue Act as section 67.

It seems that in 1915 an addition was made to it which levied a license tax upon all vendors of carbonated drinks and in consequence, the title was written for the first time as it is written now. While, however, the Revenue Act was in the course of its progress through the two houses, the tax upon vendors of carbonated drinks was stricken out, but the title to the

section has never been amended. If, therefore, the Commissioner of Revenue should be of the opinion that the term "soda fountain" covers the particular machine used in this instance, those who use this particular machine would be liable under section 67. If, however, he should be of the opinion that the term "soda fountain" does not include such a machine, then these vendors would not be taxable under section 67.

GIFT ENTERPRISE

October 24, 1924.

It seems that the Salem China Company has devised a scheme through which it may more successfully sell its goods, which scheme may be described in general terms as follows:

It sells to local dealers a forty-two piece dinner set with an agreement between the china company and the local dealer that the local dealer may issue coupons to all cash purchasers of goods from him until the amount of such cash purchases reaches the sum of \$10. There is to be no abatement of price to the purchaser. On the contrary, when he purchases goods from the local dealer he receives them at the ordinary retail prices. The coupons are simply checks upon the amount of such cash purchases. When their value reaches \$10 then the purchaser may take these coupons to the local dealer and purchase, if he chooses, from the local dealer, this forty-two piece dinner set of china at the actual cost price of same.

It is manifest from this that it is a scheme primarily to sell the dinner set. That the purchaser may be induced to trade with the local dealer by conditions of this sort is simply incident to the sale of the dinner set, as there is at no time any abatement in the cash prices of goods purchased by the consumer from the local dealer.

Upon this recitation of facts the question presented is whether or not, so far as the local dealer is concerned, this is a gift enterprise within section 52 of the Revenue Act. It must be confessed that the question is difficult and any ruling thereon, therefore, by this office must be of doubtful validity in the absence of an express decision of the Supreme Court of this State. The only interpretation made by that Court of its definition of a gift enterprise is contained in *Winston v. Beeson*, 135 N. C. In that case the Court holds that in order to constitute a gift enterprise there must be some element of chance in the scheme by which a gift is assigned to a particular person. It is manifest that there is no element of chance in this proposition. In broad terms it is simply a scheme through which the manufacturers of this dinner set are inducing people to purchase.

Section 903a of the Revenue Act requires the Commissioner of Revenue in construing the Act to give the same such construction as will be most favorable to tax payers.

For these reasons we advise that the scheme adopted by the Salem China Company would not be a gift enterprise within the statute, so far as the local dealer who distributes these coupons is concerned. It manifestly is not a taxable scheme as to the Salem China Company.

FOREIGN CORPORATION—FRANCHISE TAX

November 7, 1924.

We have had in our hands for some days the letter of Mr. F. L. Fuller, General Counsel of the Liggett & Myers Tobacco Company, in relation to the franchise tax levied by your Department upon that company for doing business in the State of North Carolina.

Since the extra session of the General Assembly in 1920 there have been under certain conditions two methods of ascertaining the franchise tax on corporations in North Carolina. Both of these methods apply as well to domestic corporations as to foreign corporations. There can be, therefore, no discrimination in the statute against the latter class.

The first method required the levy of a fee of one tenth of one per cent upon the proportion of the subscribed or issued and outstanding capital stock of the corporation represented by property owned and used for business transacted in this State. The second method, which is in reality an exception to the first, is applied when the reports of the corporation show capital stock issued and outstanding by any such company to be less than one-half of the assessed value for taxation of all the property of such company in this State for the year 1920. Then, as to a domestic corporation, the measure of the extent to which the corporate franchise of any such corporation is being used and the amount of franchise tax to be paid by any corporation shall be calculated with reference to the sum of one-half of the total assessed value of all property of such corporation for the year 1920 in this State.

With reference to a foreign corporation, when the report shows the proportion of capital stock of a foreign corporation apportionable to this State, with the proportion of the subscribed or issued and outstanding capital stock of the company represented by its property or business in this State is less than one-half of the assessed value for taxation of all the property of such company in this State, then the measure of the extent to which the corporate franchise of any such corporation is being used and the amount of franchise tax to be paid by any such corporation shall be calculated with reference to the sum of one-half the total assessed value of all the property of such corporation in this State. Of course, in each case the reports must show the condition under which the second method of assessing the franchise tax is to be operative. That is, of course, a matter for the determination of your office upon the reports of such corporation.

It seems that in the particular case you have fixed the franchise tax of Liggett & Myers Tobacco Company under the second branch of the proposition, i.e., you have arrived at it by taking one-half of the assessed value for taxation of all the property of the company in the State for the year 1924 under section 89 (3½) of the Revenue Act of 1923. Mr. Fuller's specific complaint is, if we understand it, first, that section 89 (3½) is insensible because it refers to the rules laid down in section 82 of this act, and second, that if section 89 (3½) is applied to Liggett & Myers Tobacco Company, there would result an inequality in the taxation of foreign corporations doing business in North Carolina. We do not understand from this that he claims that there is any discrimination in the provision as between domestic

and foreign corporations. It would be impossible to do that successfully, because the wording of the act is clear and distinct in applying the same rule to both classes of corporations.

Our Supreme Court has invariably held the Revenue and Machinery Acts enacted at the biennial regular sessions of the General Assembly *in pari materia* and, consequently, should be construed together. Much more, then, must all the provisions of the Revenue Act relating to the levying of a franchise tax upon corporations of both classes, domestic and foreign, be construed together in order that the meaning and the intent of the Legislature should be definitely determined. That Court has also held that where a law on a particular subject has been revised and in the revision there is a section or clause which is doubtful on account of the manner in which it is brought forward in the revisal, the original statute may be resorted to in order to ascertain the meaning of the doubtful clause.

The particular provision of which Mr. Fuller complains is incorporated in Chapter I of the Extra Session of 1920 as section 7 (b). That particular section refers to the report to be made by section 82 of the Revenue Act of 1919. The reference at that time was entirely correct. It remained correct in the Revenue Act of 1921, as it is incorporated in that act as section 82 (3½). In the Revenue Act of 1923, however, there was a renumbering of the sections of the Revenue Act, with the consequence that section 89 took the place of the sections 82 in the two preceeding Revenue Acts. In revising the law, however, in section 89 (3½), section 82 was not corrected to section 89. It is a familiar rule of statutory construction that where in the act there is a mere clerical error which is corrected by the context of the act construed in connection with the section in which there is an error, the error itself should be disregarded. Here, then, under this rule of construction, though we have section 82 of this act in section 89 (3½), it is necessarily corrected by the context to be section 89. When this is done, it is very clear that Mr. Fuller's technical objection to the levy of the tax in the particular case is without sound basis.

We do not interpret the case of *Air-way Electric Appliance Corporation v. Day*, et al., handed down by the Supreme Court of the United States on October 20, 1924, as applying to our statute or the method of levying the franchise tax adopted by you in the particular case. It is said there:

5. A license fee or excise of a given per cent of the entire authorized capital of a foreign corporation doing both a local and interstate business in several States, although declared by the State imposing it to be merely a charge for the privilege of conducting a local business therein, is essentially and for every practical purpose a tax on the entire business of the corporation, including that which is interstate, and on its entire property including that in other states; and this because the capital stock of the corporations represents all its business of every class and all its property wherever located.

6. When tested, as it must be, by its substance—its essential and practical operation—rather than its form or local characterization, such a license fee or excise is unconstitutional and void as illegally burdening interstate commerce and also as wanting

in due process because laying a tax on property beyond the jurisdiction of the State. *International Paper Co. v. Massachusetts*, 246 U. S., 135, 141.

In North Carolina, however, the tax is not levied with reference to the entire authorized capital of the foreign corporation but only to that proportion of its actual issued and outstanding capital stock as represented by the property of the corporation located in North Carolina. It was upon this distinction that the Supreme Court of the United States based its decision in the Air-way case.

It is, we think, apparent that there is no unconstitutional discrimination between foreign corporations when one pays tax upon its outstanding and issued capital stock as represented and apportioned by its property in the State, and one pays the tax which is calculated with reference to the sum of one-half of the total assessed value of all the property of such corporation in this State. In other words, it is a legitimate classification.

INHERITANCE TAX—VESTED INTEREST

December 23, 1924.

In the Matter of the Estate of John W. Smith

Stated broadly, Mr. Smith's will created a trust of all his property which was to last for two periods, ten and five years. His main purpose was to give all of his property to his wife and two sons, protecting, however, the interest of the two sons from their own wastefulness or extravagance by creating the trust. If a son should die without leaving issue during the running of the trust, then in item 11 of the will he gives the residue of his estate to Minnie Smith, Mrs. Daisy E. Beasley and Mamie R. Suitt, to be divided equally among them. Both of Mr. Smith's sons died during the pendency of the trust and without leaving issue at all. Consequently the residue of his estate vested in those named who are still living.

However, it appears from the trust created by the will that it still continues for the ten year period for the benefit of the widow of John W. Smith, who is still living. We think it quite clear that the estate is taxable now to the widow in proportion to the appraised value of her share less the deduction allowed by the statute, and to the three ladies who take the residue in the proportion which they take and subject to the rates to be fixed by their relationship to the deceased testator.

FRANCHISE TAX—DOING BUSINESS

February 4, 1925.

In re Wright-Bachmann Lumber Company

This company came into North Carolina some years ago and domesticated under the laws of this State to do the business of purchasing and selling lumber and timber-lands. It had also authority to manufacture

lumber. It seems that it purchased in the State a large quantity of these timber lands. For the last several years it has held such lands without either manufacturing lumber or selling the lands themselves. Upon this it claims that it is not doing business in the State in such way as to subject itself to the annual franchise tax.

We have always regarded the test of not doing business in a particular year if a corporation was authorized to do the business or if doing business, not doing it at a profit, as not being a test as to whether a corporation is liable to the annual franchise tax. The syllabus to *Lane Timber Company v. Hynson*, 299 Fed. Rep., 619, it seems to us is controlling. It is as follows:

A corporation organized for the purpose of buying and selling timber-lands, which held a large quantity of such lands being offered on the market through agents, but which did no other business, and had bought no timber-land, and had made no sales for some time, *held* a corporation "doing business," and assessment of tax against it by collector of internal revenue was authorized.

A corporation has not ceased doing business, so as to be exempt from tax on corporations doing business, when corporate activities have not been transferred to some other company or individual, and the corporate existence is preserved for the purpose for which it was organized.

INCOME TAX—FOREIGN CORPORATION—DOING BUSINESS

March 26, 1925.

We have considered the letter of the Baldwin Piano Company of March 12th with reference to the liability of that company for income tax upon business done in North Carolina. Boiled down to its essential elements, this company's plan to do business may be stated as follows:

Dealers in pianos in North Carolina are appointed their agents to sell pianos in this State. Pianos are stored in the warehouse of the dealer and are sold from such warehouse or store. The title to the pianos does not pass from the Baldwin Company to such dealers until they are fully paid for. When they are sold to proposed purchasers on the installment plan, the dealer forwards to the Baldwin Company the retail purchaser's contracts. The dealer collects the periodical payments and transmits them to the Baldwin Company at Cincinnati. In all cases, whether a sale is for cash or upon the installment plan, the dealer is compensated by commissions upon such sale.

We think that under circumstances of this sort, the Baldwin Piano Company is doing business in North Carolina and is liable to income tax upon such business. *Cheney Bros. Co. v. Mass.*, 246 U. S., 147.

INHERITANCE TAX—EXEMPTIONS

April 21, 1925.

You have today submitted to me inheritance tax inventory of the estate of J. M. Rogers, Wachovia Bank & Trust Company and Francis M. Rogers,

Executors. You submit also correspondence between your office and representatives of this estate and ask for a ruling from this Department as to whether the requests in items 10, 11, 12 and 15 are subject to inheritance tax.

By item 10 of the will \$5,000 is bequeathed to the foreign mission committee of the Presbyterian Church (South) to be used in connection with the Mary Erwin Rogers Hospital in China. By item 11, \$5,000 is bequeathed to the home mission committee of the Presbyterian Church (South) in the United States. By item 12, a bequest of \$2,500 is made to the executive committee of Christian education and ministerial relief of the Presbyterian Church (South) in the United States. By item 15, a bequest of \$1,000 is made to the trustees of Stillman Institute of the Presbyterian Church of Tuscaloosa, Alabama.

By the 3d subsection of section 6, Chapter 4, Laws of 1923, it is provided:

That no taxes be imposed or collected under this section on legacies or property passing by will or otherwise or by the laws of this State to religious, educational or charitable corporations (not conducted for profit) in this State.

It is thus apparent that it was the intent of the Legislature to exempt from this inheritance tax only those beneficiaries who were within the State of North Carolina.

It is contended by the executors that some of these bequests are not taxable for the reason that the Presbyterian Church (South) was incorporated by Legislative action of this State in 1866. That fact is not determinative of the matter. The right to tax is usually determined, not by the residence of the guardian, executor or trustee, but by that of the beneficiary of a trust. That principal runs through the whole of our taxation laws. The situs for taxation and the relationship of parties are usually determined upon these facts as they affect a beneficiary and not a trustee.

It is my opinion, therefore, that the bequest of \$5,000 in the 10th item of this will is taxable under our law for the reason that the beneficiary is not a resident of this State.

The imposition of the inheritance tax under items 11 and 12 of the will should be determined upon ascertaining what part, if any, of those bequests go to residents of this State.

The bequest in item 15 of the will is taxable for the same reason as indicated with respect to item 10.

AUTOMOBILES—LICENSE TAX—FEDERAL AGENCIES

May 15, 1925.

You submit to me a letter of Honorable Andrew W. Mellon, Secretary of the Treasury of the United States, in regard to North Carolina automobile license plates. Secretary Mellon states that it is the desire of his Department to use certain motor vehicles forfeited for violations of the custom laws or national prohibition act in the enforcement of these laws, and to assign certain of these forfeited automobiles for such use in this State. He

states that under a decision of the Comptroller General of September 20, 1921, the Treasury Department is not permitted to purchase license plates from the State. He, therefore, in this letter to Governor McLean requests the assignment, upon proper application for use in this work, of a number of license tags for use on these automobiles.

You ask if this may be done by your Department without the collection of the usual license fees required for the issuance of the automobile plates.

This State has no right to tax the instruments, means or agencies provided or selected by the United States to enable it to carry into execution its legitimate powers and functions. Such has been the uniform holding of the courts and the practice from the beginning of the government. See *McCullough v. Maryland*, 4 Wheat., 315; 4 L. Ed., 579.

I would then say that as a matter of principle, this State cannot tax automobiles owned and operated by the United States Government, nor could it require the Federal Government to purchase the automobile plates before being entitled to operate these cars. In other words, the Federal Government might place these automobiles in operation in the State without obtaining the plates and without paying the license fees ordinarily required for their operation. I find that this has been directly decided by the Supreme Court of the United States in the case of *Johnson v. State of Maryland*, 254 U. S., 51; 41 Sup. Ct. Rep., 16. In that case it was held that the State cannot require the driver of a Government motor truck carrying the mails to procure a license after satisfying its officials of his competence and paying a fee therefor. Of course, the operator of a Government automobile or truck would be subject to the usual laws of the road while engaged in the operation of such a machine, but that matter does not here arise.

It being clear, then, that this State may not require the payment of the license fees in question by the Government and that such cars may be operated without such payment, it remains to determine what your department should do in response to this request from Secretary Mellon. His department could operate the cars without attaching plates to them, but for obvious reasons he wants to operate the cars in the ordinary and usual way.

I think that you have a right to allocate to the Treasury Department such number of these license plates as would meet its needs and deliver them to the proper officials of the Federal Government without requiring the payment of the license fees. There is a comity which exists between different governments by reason of which they seek to tide each other in the performance of their functions. That principle applies between different nations. It has stronger force and there is greater reason for its application between the several states of the American Union and between the Federal Government and a particular state. There is all the more reason why that spirit of comity should be called into play as it affects the instant matter when we consider that the Federal Government is seeking to use these plates so that it may better enforce those laws in which the citizens of this State are equally interested with those of all the other states.

For the reasons stated, I advise that you have the right to allocate and issue these automobile plates as requested by Secretary Mellon.

GASOLINE TAX—REFUND

May 30, 1925.

In the Matter of Gasoline Tax

The definitions contained in the act, C. S. Section 2613(c), are as follows:

Motor vehicles shall include all vehicles, etc., which are operated or propelled by combustion of gasoline, etc., for travel on the public highways. The term "dealer" is defined as any person or corporation who has in his (or its) possession for sale to the consumer any gasoline, etc., for operating or propelling motor vehicles as herein defined for use, distribution or sale in the State. Motor vehicles are defined as those which are operated and used for travel on the public highways.

Section 2613(d) levies the tax on sales or distributions as dealers or distributors of motor vehicle fuel as above defined.

Section 2613(e) provides for reports each month of the number of gallons of motor vehicle fuel purchased and sold to be used in motor vehicles by him or them during the preceding calendar month.

It is manifest from this short recapitulation of the salient provisions of the statute that all gasoline, etc., brought into the State of North Carolina for sale or distribution therein when it is to be used in motor vehicles as defined in the act, i.e., those operated and used for travel on the public highways, is to pay the tax of 4c per gallon. All gasoline not so used is not subject to the tax. The general practice has been in the administration of this law that the importers of gasoline into the State, the great dealers in the product, have by general consent paid the tax upon gasoline brought into the State by them and distributed and sold in the State. They sell and distribute the gasoline some times to retail dealers and some times to wholesale dealers. Under circumstances of this sort, certain claims for refund of taxes paid upon the sale of gasoline in the State have been made to your office.

(1) The wholesale dealer has made a claim for refund of taxes on gasoline actually consumed by him in his delivery trucks but not sold. We think that if this wholesale dealer has imported the gasoline from another state and that he has paid the tax of 4 cents upon it, the same not having been paid by the great distributors, then he would be entitled to a refund limited strictly to the gasoline actually used by him in the distribution of the product to the retail dealer whom he serves. If, however, these great distributors have themselves paid the tax and he has purchased from them, then neither in law or equity has he any claim to the refund, because his payment of the tax is only indirect as it is included in the wholesale price to him by the distributor. Under circumstances of this kind we think the claim on the part of the distributor for this particular gasoline so viewed would be a valid one. It is only in this way that the law could be properly and justly administered with reference to gasoline brought into the State but consumed without sale by the importer.

(2) Claims have been made for a refund of the gasoline tax by those who have purchased it from the distributors who have paid the tax upon the gasoline, but the purchasers have used it, not in operating a motor vehicle for travel on the public highways, but in some other way which

does not bring it within the meaning of the taxing statute. We think the observations under No. 1, above, are applicable also to this condition. The gasoline has been brought into the State and has been sold for general purposes including the operating of motor vehicles on the public highway. The tax has been paid by the immediate importer. If, therefore, there should be any refund in such case, the claim for the same must be made by the person thus using the gasoline in the first instance to the importer, with the importer to make the claim for the refund to the Department.

It is not always true that the tax levied by the State fixes definitely and positively the selling rate of the product. The importer may be willing to pay a part of the tax in order to obtain customers. Manifestly, then, it would be unjust and improper for the refund to be made to that customer immediately instead of through a claim made by the importer himself. In other words, the claim for refund must be made in all instances by the person, firm or corporation which pays the tax. A somewhat similar act imposing a tax upon the sale of gasoline for use in motors on public highways has been sustained by the United States Supreme Court in *Pearce Oil Corporation v. Hopkins*, 264 U. S., 137.

INHERITANCE TAX—\$200 EXEMPTION

June 19, 1925.

The Revenue Act of 1923, last clause of the first paragraph, on page 7 of the same, contained this provision:

Nor shall any tax be imposed in any case where the whole amount of such legacy or devise does not exceed two hundred dollars in value.

The former Attorney General, Judge Manning, ruled that this provision of the statute applied only to estates where the decedent died testate, and that as to those estates, no tax could be levied under conditions stated in the statute. It was otherwise where the decedent died intestate, as from the wording of the law it is clear that it was confined to cases of testacy.

In this opinion this office concurs as to the Act of 1923.

INCOME TAX—DEDUCTION OF GIFTS

July 2, 1925.

You ask the opinion of this office as to whether corporations are entitled to the deduction for contributions as set out in subsection 9, section 306, Revenue Act of 1923. That subsection is as follows:

Contributions or gifts made within the taxable year to corporations or associations operated exclusively for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder

or individual, to an amount not in excess of fifteen per centum of the taxpayer's net income as computed without the benefit of this subdivision.

Subsection 1 of section 105 of the Revenue Act of 1923 is as follows:

The word "taxpayer" includes any individual, corporation or fiduciary subject to the tax imposed by this act.

It is my opinion that corporations are entitled to the deduction for contributions or gifts as allowed in the quoted section.

INDUSTRIAL BANKS—REPORTS

July 14, 1925.

In reply to requests submitted by you for ruling on the subject, I have to say that in my opinion industrial banks should be permitted to report under the same law as other banks and upon the form prepared for and used by banks generally.

I refrain from a lengthy discussion of the subject since we have heretofore gone into it fully, and herewith simply give you my ruling on the matter.

INCOME TAX—N. C. RAILROAD

July 29, 1925.

In the Matter of Income Tax from the N. C. Railroad

The State of North Carolina owns the controlling stock in this corporation. It is, however, in no sense a part of the State Government. In the investment the State is acting the ordinary part of a stockholder in the corporation. That corporation is controlled by its stockholders and board of directors as is any other corporation. I can see no reason in law why this corporate entity should be exempt from the payment of income tax, whereas, all other corporations, railroad and otherwise, are paying income tax. The lease of the North Carolina Railroad Company to the Southern Railway Company makes provision for the payment of income taxes assessed upon the North Carolina Railroad Company by the Southern Railway Company. The part of the lease material is as follows:

All of such taxes and assessments shall be paid by the party of the second part so as to entirely relieve the party of the first part of the payment of any taxes of any nature whatever during the continuance of this lease upon the property leased or franchise of the party of the first part or its income from the leased property.

STATUTES—SECTIONS 39 AND 56

August 4, 1925.

You call my attention to Sections 39 and 56 of the Revenue Act of 1925 and ask for construction by this office of these two sections.

Section 39 is entitled "Commission Merchants" and, after levying a tax on such merchants, provides "and on every person, firm or corporation selling, or offering for sale, stocks in foreign corporations, an annual tax of \$200." Section 56 imposes a tax on dealers in stocks, bonds and other securities, the tax being graduated according to the population of the town in which carried on.

There is apparent conflict between the concluding part of Section 39 and Section 56. One who obtains license under Section 56 to deal in stocks, bonds and other securities would thereby be licensed to deal in stocks in foreign corporations covered by Section 39.

It is a rule of statutory construction obtaining generally and further explained in Section 204 of the Revenue Act that your construction of the Act is to be favorable to the taxpayer. Following that principle, in view of the conflict between Sections 39 and 56, you should disregard provisions at the end of Section 39 and impose and collect taxes on stock dealers as set out in Section 56.

Construing Section 39 with Section 101, a county would have the right to impose a tax on dealers in stock of foreign corporations similar to that imposed by that Section. Section 56 prevents the imposition of license tax by a county, city or town on the stockbroker therein described. I think the provision contained in Section 56 prohibiting the imposition of license tax under that Section should be followed by the counties for the reason that you are operating under Section 56, and for the further reason that one being licensed under that Section by your department has thereby the right to deal in stock of foreign corporations, and if this construction is followed that limitation would apply on the counties in any effort to impose the tax on dealers in such stocks, bonds or other securities.

GASOLINE TAX—REFUND

August 6, 1925.

You submit to me letter of postmaster at Greenville, N. C., addressed to Honorable W. N. Everett, Secretary of State, asking for forms for refund of 3 cents per gallon on gasoline used by Government owned motor vehicles at that postoffice.

It is my opinion that your Department is not liable for and should not make the payment requested. I advised you in a letter of May 15th that the State could not require payment of license tax on Government owned and operated motor vehicles. The gasoline tax is entirely different and distinct from the license plate tax. The gasoline tax is paid by the dealer. You have collected no such tax from the United States Government or from any of its departments or officers. The fact that the Government may have paid

an increased price for the gasoline used by it as a consequence of the payment of the tax by the dealer gives it no claim for a refund by your Department. Such an increased price is always incident to the imposition of taxes upon a dealer who sells to the consumer. It cannot properly and legally be said that such a tax has been levied against or paid by the consumer so as to entitle him to a refund where such is permitted for the recovery of taxes improperly or illegally paid.

There are other reasons in support of this view, but for the reasons stated, I advise that your Department should not make the payments requested.

INCOME TAX—N. C. RAILROAD

August 6, 1925.

After giving careful consideration to the letter of Assistant Attorney General Nash in re: Taxation of income of North Carolina Railroad, I reached the same conclusion as expressed in his letter. In my examination of the subject, I have compared Revenue Acts of 1921, 1923, and 1925. In subsection (c) of section 4 of each of these acts it is provided that the income tax shall be levied on and payable by "every domestic corporation." The method by which the tax is to be imposed upon the income of railroads and other public service corporations is set out in section 202 of the Acts. The method of ascertaining the net income as therein provided was sustained by the Supreme Court of the United States in *Railroad Companies v. Doughton, Commissioner*, in 262 U. S., 413. There is nothing in the acts nor in the opinion of the United States Supreme Court which in any way operates to relieve the North Carolina Railroad from the payment of an income tax. On the contrary, the reasoning in that opinion and the approval by the Court of the method used by the State in ascertaining the net income of railroads is in entire harmony with the contention that the income of the North Carolina Railroad is taxable.

I am of opinion that the income of that railroad is taxable under the Acts of 1921 and 1923. Certainly, there can be no question about it under the Acts of 1925, which permits the deduction of "rents paid within this State" from net operating income. Such a deduction was not permitted by the Acts of 1921 and 1923, but the Supreme Court of the United States held that net income could be ascertained and taxed without the deduction of capital charges such as these, as the North Carolina statute used the railroad property operated within the State as the entity to be taxed.

As stated, I concur in the opinion of Mr. Nash that the income of the North Carolina Railroad is taxable under the Acts of 1921 and 1923.

LICENSE TAX—CONTRACTORS

August 17, 1925.

In Section 45-a of the Revenue Act, the General Assembly of 1925 imposes a license or occupation tax on every person, firm or corporation who for a

fixed price or fee undertakes to construct buildings, highways or other structures in accordance with the plans and specifications prepared by a licensed architect or registered engineer. It grades the amount of the tax as follows:

If the contract price is not less than \$10,000 nor more than \$100,000, the annual license tax is to be \$250. Where, however, the structure is to cost more than \$100,000, the annual license tax shall be \$500.

It is quite possible that a single contracting firm or corporation may undertake to erect a structure in one county where the cost would be between \$10,000 and \$100,000, while the same firm or corporation could undertake to construct a structure whose cost would be more than \$100,000. It seems to me that in such case the General Assembly having graduated the tax by the cost of the work to be done, that this contractor, whether firm or corporation, would be liable for the \$250 license tax on one contract and \$500 on the other contract. The act does not tax the doing of the business specifically but the entering into the particular contract. Section 22 of the Revenue Act declares:

Unless otherwise provided in the section levying the tax, the tax levied for the use and benefit of the State shall be collected in each county in which the business is conducted.

It also declares that if a business that is made taxable under this schedule is carried on at two or more separate places, a separate license for each place of business shall be required. Consequently, it seems quite clear that if in one county a particular firm has a contract of from \$10,000 to \$100,000, the county itself may levy the same tax that the State does, i.e., \$250, and if the same firm or corporation has a contract for construction exceeding \$100,000 in another county, that county may also collect the \$500 annual tax. See section 101.

I do not understand that if this tax is collected one year and the contract is not completed until the ensuing year that an additional license tax can be required of the company during the second year, the time of the contract itself fixing the annual tax. This seems contrary to section 22, which requires the license issued under schedule to expire on the 31st day of May of each year. I interpret section 45-a; however, as from its nature and the nature of the tax which is levied forming an exception to this general rule.

GASOLINE TAX—REFUND

August 19, 1925.

Replying to your inquiry of the 14th, as to refund of gasoline tax. We beg to advise that the so called gasoline tax is not, of course, technically a tax on gasoline but a privilege tax upon those who "engage in the sale or distribution of motor vehicle fuel, as herein defined." (Section 33, Highway Act) Section 34 in providing the machinery for the collection of this tax says the statement given by the dealer shall show "the gallons of motor vehicle fuel purchased and sold to be used in motor vehicles." We have then a privilege tax upon the distributor of motor vehicle fuel graduated

or measured by the volume of business done by the dealer in this particular article. Still further limited, however, by the purpose for which the fuel is to be used. This measure presents some difficulties both to the dealer and the tax collector, but similar tests in other States have been approved both by the State and Federal Courts. See

Standard Oil Company v. Brodie, 153 Arkansas 114.

Pierce Oil Company v. Hopkins, 282 Federal 253.

Askew v. Continental Oil Company, 252 U. S. 444.

Bowman v. Continental Oil Company, 256 U. S. 642.

It is familiar learning that one that would take advantage of an exception must assume the burden of proof. Gasoline is so generally used for propelling motor vehicles that one claiming another use is clearly the exception. Section 32, subsection A, of the Highway Act defines a motor vehicle as one propelled by a combustion engine and operated and used for travel upon the public highways. The law would have been valid if the measure of the dealers tax had been the entire amount of gasoline bought or sold by him, but the Legislature realizing the universal tendency to pass the tax on to the ultimate consumer sought to limit the burden of the tax as far as practicable to those receiving a special benefit from the use to which the tax was to be put. They adopted, therefore, as the measure of the tax the amount of gasoline sold or distributed for use in motor vehicles. This sets up a standard that it is practical to administer. The measure is not the ultimate and final use to which the fuel is put but the kind or character of the machine that it is bought to operate. A dealer would be in hopeless confusion if he had to divide the quantity of gasoline that he sells for use in a truck, for instance into two parts, one being consumed by the truck while on the highway and the other being consumed by the truck while off the highway.

Ordinarily only the person who pays a tax can claim a refund, CS-7979. Under this section, as amended in Volume 3, refunds may be made "to persons who are entitled thereto." Under authority of this provision, if one can show to the satisfaction of the Commissioner of Revenue that the dealer from whom he purchased gasoline has included the gasoline sold him in the amount upon which the dealers license tax was computed, and that the customer paid an increased price of 4 cents per gallon by reason thereof, and that the gasoline was not purchased to be used in a motor vehicle, the Commissioner may refund the tax. All doubt in such cases should be resolved in favor of the State. No refund should be made on gasoline used in motor vehicle whatever the particular work being done by the motor vehicle. The law makes the sale or distribution for use in a motor vehicle the measure and unless this measure is rigidly observed the enforcement of the law will lead to hopeless confusion. Some hardships may result but a rigidity of standard is necessary for the enforcement of the tax law for "all taxes are odious."

Tractors equipped with lugs or cleats which render them unlawful machines for operating upon the highways are not motor vehicles within the definition of the Statute but trucks made and designed for use upon the highways, wherever operated, are motor vehicles.

INHERITANCE TAX—COMMON DISASTER

September 4, 1925.

In re Estate of Gerson Heller

You state in your letter of September 4th that you understand that Mr. Heller and his mother, Mrs. Amelia Heller, died in a common disaster. It appears that the personal representative of Mr. Heller is claiming that a legacy of \$23,774.34 passed to the mother under the will, and is undertaking to pay the inheritance tax on that basis.

When two persons die in a common disaster, there is no presumption as to which survived the other. Survivorship can, of course, be shown by any facts and circumstances sufficient as evidence to produce conviction on the subject. If there is no proof on the subject, the right to the property will be adjudged as it would be if it were known that both died at the same instant. *Royal Arcanum v. Kacer*, 69 S. W., 671; 17 C. J., 1180.

Such being the law, and without evidence that Mrs. Heller predeceased Mr. Heller, the estate of Gerson Heller would pass directly to the brothers and sisters, and they would receive it from him and not from their mother. You should, therefore, impose and collect an inheritance tax of \$713.22 instead of the \$217.74 as tendered by the personal representative of Mr. Heller.

GASOLINE TAX—REFUND

September 16, 1925.

As we understand it, the Standard Oil Company pays the 4 cents per gallon tax on gasoline before distributed to dealers in the State. I. G. Patterson is one of the dealers who purchases gasoline from the Standard Oil Company. In transferring gasoline from the tank car to his own tank, for his own convenience and in the conduct of his business, he spilled a certain quantity of gasoline. He thereupon applies to you for a refund of the tax on this gasoline so spilled. In the opinion of this office he is not entitled to the refund, the loss being occasioned by his own neglect, or if not, by circumstances over which the State of North Carolina has no control. In addition to this, if you ever commence making such refunds, the law itself could not be properly administered as there would be no end to such claims.

LICENSE TAX—OUTDOOR ADVERTISING

October 8, 1925.

You inquire of this office as to the extent of the application of section 76-a, Revenue Act of 1925, with respect to imposing tax upon outdoor advertising, and particularly inquire as to whether this tax is to be imposed upon those engaged in operating what is popularly known as bill-boards.

It seems to me that the section unquestionably applies in such cases. It would seem that the application of the section to such form of advertisement by means of bill-boards is so clear that no difficulty of construction arises. It follows as a necessary consequence that the proviso limiting taxes to be levied on such advertising to the amounts specified therein applies to this taxable subject.

INHERITANCE TAX—HUSBAND OF ADOPTED CHILD

November 28, 1925.

You ask the opinion of this office as to whether the husband of an adopted child is a son-in-law of the deceased parent within the meaning of the inheritance tax law, section 6, subsection 1st. The term used in that statute is "son-in-law." We think that the husband of an adopted child is not a son-in-law within the meaning of this statute. The statutory adoption in North Carolina puts the adopted child on the same footing as a real child when its provisions are conformed with, so far as inheriting the real estate of the deceased and being entitled to a share in the personal property, are concerned. It extends no further. It does not alter the relationship of a man who marries the adopted child to the adoptive parent.

LICENSE TAX—ELECTRICAL EQUIPMENT

December 14, 1925.

Section 80 of the Revenue Act which heretofore has dealt only with plumbers and steam and gas pipe fitters, was amended in 1925 by putting this clause after the word "fitter": "or selling or installing electrical equipment." It is manifest from this that those engaged in the business of installing electrical equipment were put upon the same footing as to occupation tax with plumbers and steam or gas pipe fitters. This section of the Revenue Act has been and is now graded as to the amount of tax by the number of persons employed in the establishment the previous year. The act of 1925, however, in addition to imposing this occupation tax upon those installing electrical equipment, imposed the same tax upon those selling such equipment, although they do not install the same. Under such circumstances, you request the opinion of this office as to whether or not a general merchant selling electric light bulbs for use by the purchaser is subject to the tax imposed by this section. We think not. An electric light bulb is a simple article of commerce which under the custom of builders and

electricians is not included in the term "equipment" in its relation to the installation of an electric light system in a particular building. The intent of the Legislature, we think, was to levy a tax on persons, firms or corporations selling or installing constructional electric equipment, and not upon those who deal, as an incident to their other business, in small household electrical appliances which are to be installed by the purchaser and do not require expert help for their installation.

INCOME TAX—MEMBERS OF GENERAL ASSEMBLY

January 21, 1926.

Through Mr. A. E. Beddingfield you submit inquiry as to whether members of the General Assembly are liable for income tax on amounts paid them as members of the Senate and House of Representatives.

The pay of members of the General Assembly is fixed by Constitution, Article II, Section 28. I am of the opinion that they are not liable for income tax on the compensation therein provided.

CONSTITUTION—HOMESTEAD NOTES

The recent amendment to the State Constitution in regard to taxation of homes, homesteads, notes, and mortgages provides for exemption, under certain well defined restrictions, of homes, homesteads, notes and mortgages, or other evidences of indebtedness. Before exemption can be obtained, certain prerequisites must exist.

1. The notes, mortgages, or evidences of indebtedness must have been given in good faith to build, repair, or purchase a home.
2. The loan must not exceed \$8,000 and must run not less than one nor more than thirty years.
3. The holder of the note or mortgage must live in the same county where the land lies, and list and pay taxes on said notes or mortgages.
4. The "home" bought, built, or repaired, must have been actually occupied by the owner as a home for at least three months preceeding the time of listing.
5. The "home" may be exempt from taxation for fifty per cent of the amount of notes or mortgage and the notes or mortgage exempt for fifty per cent of the value, provided both "home" and notes or mortgage are listed and taxed in the same county.
6. The note and mortgage upon which exemption is claimed by the "home" owner must be specifically listed by name and taxes paid to the local authorities on fifty per cent of its value.

INHERITANCE TAX—DESCENDANTS OF UNCLE OR AUNT

February 11, 1926.

I have your letter of February 11th asking:

"Are the descendants of 'uncle or aunt by blood' entitled to the inheritance tax rate set out in the second subsection of Section 6, Chapter 4, Public Laws 1923?"

The answer is "No." I approve opinion heretofore given you on the subject by former Attorney General Manning.

INCOME TAX—DEDUCTION—INTEREST

March 1, 1926.

You propound a question to this office arising out of the following circumstances:

A. During the income tax year of 1925 invested in the stock of a foreign corporation doing business in the State; which, however, has in the State two-thirds in value of its total property, and pays income tax in proportion to the value of its property in the State. In making that investment, A. contracted a debt—to what amount we are not advised. He claims, however, that he is entitled to deduct the interest on that indebtedness from his income tax return for 1925. Has he the right to do this?

Section 306, subsection 3, of the act of 1923 was in the following form:

All interest paid during the income year on indebtedness except interest on obligations contracted for the purchase of non-taxable securities may be deducted.

Dividends on preferred stock shall not be deducted as interest.

The General Assembly of 1925 put in this subsection 3, after the word "securities" the following clause:

On stock, the income tax upon which has been paid to this State by the corporation.

Subsection 5 of section 306 above, in the act of 1923 and that of 1925, was and is as follows, in stating deductions:

Dividends from stock in any corporation, the income of which shall have been assessed and the tax on such income paid by the corporation under the provisions of this act: *Provided*, that when only part of the income of any corporation shall have been assessed under this act, only a corresponding part of the dividends received therefrom shall be deducted.

It is manifest from this recapitulation that there are two questions involved in determining A's right to deduct this interest. *First*, does the amendment of 1925 include such investment, and as a consequence, is he prevented by the plain terms of that amendment from deducting interest on indebtedness incurred in purchasing stock of the character described?

Second, if he is not entitled to deduct the interest absolutely, may he deduct the proportionate part of it represented by the amount of income tax paid by the corporation having two-thirds of its total property in the State of North Carolina?

(1) The plain terms of the amendment of 1925, interpreted in the light of the provision contained in subsection 5 quoted above we think prevent A. from claiming a deduction of the full amount of his interest because it is plain from the facts hereinbefore stated that the corporation has paid income tax on two-thirds of its income for the income year. Of course, it is possible to contend that the Legislature intended that this prohibition to deduct interest on such obligations applies only where income tax has been paid upon the total amount of its property by the corporation. We think, however, this is too narrow and restricted a construction and does not carry out the purpose, when interpreted in connection with subsection 5, of the Legislature in incorporating this amendment in subsection 3. Consequently, we think that A. has no right to deduct the interest on the indebtedness incurred in the purchase of such stock wholly.

(2) We think, however, that as income has been paid by the corporation to the extent of two-thirds, he may not deduct the interest on two-thirds of this indebtedness. He may, however, deduct the interest on one-third as carrying out the purpose of the General Assembly as set out in the proviso in subsection 5—that is, if his indebtedness amounts to \$1,500, he may under the circumstances of this case deduct the interest on \$500, but may not deduct the interest on the remaining two-thirds, \$1,000.

We think this carries out the purpose of the Legislature in making the amendment, interpreting it in connection with the other provision of section 306 as set out hereinbefore.

LICENSE TAX—FLORISTS

March 16, 1926.

In the Matter of the Truck Farmers in New Hanover County

It seems in the county of New Hanover, near the City of Wilmington (some of them within one mile of the corporate limits of the city) there are a number of truck farmers who have formed a coöperative marketing association under the act which disposes of their products to the best advantage. Part of their business is the raising of bulbs which are also to be distributed and sold by this coöperative association. In the process of raising these bulbs at this season of the year there are flowers produced. These flowers the truck farmers are selling to florists within the city of Wilmington. The florists in the city of Wilmington deal directly with the consumer, while the truck farmer deals only with the florists.

You ask a ruling from this office upon section 74-a of the Revenue Act upon the question as to whether or not these truck farmers are liable for the occupation tax imposed by that section. We think they are not. The flowers themselves are a mere by-product of the truck farm. They are

a mere incident to the raising of bulbs for the market. They last only a few weeks during the year and do not constitute in any sense an important part of the business of these truck farmers. Section 74-a imposes an annual license or occupation tax upon those doing the business of a florist. If these truck farmers were making a regular business of raising flowers for the market, but were selling the flowers to the local florist but not themselves dealing directly with the consumer, we think they would come within one of the definitions of florists as contained in the dictionary, i.e., a "cultivator of flowers." These men, however, are not engaged in the business of cultivating flowers, as hereinbefore suggested. The statute evidently intends to impose a tax only upon those doing a regular business of raising flowers for the market or selling flowers to consumers directly.

Nor do we think that the raising of bulbs and marketing those bulbs after they are raised would come within the definition of florists in such way as to subject them to the occupation tax of section 74-a. These bulbs are in reality seed. They are in no sense flowers until they germinate and produce the flowers. One of the definitions of seed is: "any propagated portion of a plant including true seeds, seed-like fruits, tubers, bulbs, etc."

To the conditions set out above in relation to these truck farmers, we think section 904 of the Revenue Act would be peculiarly applicable. That section requires you in construing the act to give it such construction as will be most favorable to the taxpayer.

TAX YEAR

March 23, 1926.

You submit to me letter of Mr. W. L. Stanley, Vice President of the Seaboard Air Line Railway Company, and ask my opinion as to period covered by taxes levied by counties. By the express provision of section 1 of the Revenue Act of 1925 the property taxes therein authorized to be levied "shall be for the calendar year in which they become due."

LICENSE TAX—REAL ESTATE DEALERS

March 26, 1926.

You recently asked my opinion as to the inclusiveness and effect of section 30 of the Revenue Act of 1925 providing generally for a tax upon dealers in real estate.

As you know, the section was rewritten by the General Assembly of 1925. Prior to that time the section only undertook to tax those acting as agents for others and not those engaged in the business and selling their own property.

In the 1925 act the tax applies to those "buying or selling real estate of any and every description for profit, whether as agent or otherwise," with a proviso "that this section shall apply only to individuals, firms

or corporations engaging in the business herein taxed." The present act, therefore, is not limited to those who act as agents for others, but includes those who engage in the business of buying or selling real estate for profit. This, of course, can only mean that it applies to persons who buy property or who, owning it, sell thereafter for a profit. The tax would not be collectible as against one who engaged in a purely isolated transaction. The dealing must be of sufficient consequences, and be repeated with such frequency as would cause it to be regarded as engaging in the business.

It is, of course, impossible to say how many transactions would constitute "engaging in the business." Neither your department nor mine can establish an arbitrary standard of this kind based entirely upon the number of purchases or sales. It is enough to say that where the purchases or sales have been considerable, your department would be justified in holding that such person was engaged in the business. In many cases determination as to the liability for the tax will depend also upon other facts and circumstances.

LICENSE TAX—AUTOMOBILE DEALERS—MOTOR BUSES

April 10, 1926.

You ask an interpretation of section 78 of the Revenue Act with reference to the following conditions:

Certain persons engaged in the business of selling automobiles in the State of North Carolina and licensed to do so are attempting to sell motor busses without paying an additional tax. Certain other persons are licensed under section 78 to sell a particular brand of trucks and are also claiming that that license permits them to sell motor busses without paying an additional tax.

We think that each one of these classes so selling motor busses is liable for an additional tax of \$500 for the sale of motor busses. Section 78 imposes this license tax on every make or brand of automobile or automobile trucks. It is further declared that the \$500 license tax herein imposed shall be for each class or trade name of machine offered for sale. It is clear that the term "automobile" includes motor busses. *Bethlehem Motors Corporation v. Flint*, 178 N. C., 399. But it is a different class and a different trade name from that of automobile for pleasure or private ownership.

INHERITANCE TAX—STOCK IN N. C. CORPORATION

April 15, 1926.

A, a nonresident decedent, owns stock in a North Carolina corporation. That stock after the payment of the inheritance tax upon its transfer is transferred to the executors of the estate of A. B., one of the legatees of A's estate, pending the settlement of that estate, dies, leaving a last will and testament in which executors are appointed. The executors of A's estate transfer ten shares of the stock of the North Carolina corporation to

the executors of B's estate. As a consequence, these ten shares become part of the assets of B's estate in the process of administration. Being such, we think the subsequent transfer of these shares of stock by the executors of B's estate would be taxable under the laws of North Carolina. Under such circumstances, there would certainly be two transfers of the particular shares of stock in such way as to subject each transfer to tax. We do not think that the transfer of these shares of stock from the executors of A to the executors of B would be taxable, but only the subsequent transfer of the shares by the executors of B.

LICENSE TAX—ENGINEERS

June 22, 1926.

Mr. L. McC. Ross is superintendent of roads in the county of Mecklenburg. The statute creating the Highway Commission for that county requires the superintendent to be an engineer. The stationery used by the Mecklenburg Highway Commission has at its head, among other things, "L. McC. Ross, Engineer." Mr. Ross claims that though he is an engineer and though he takes out a license from the State Engineering Board, he does not practice engineering in such sense as to subject himself to the license tax imposed by section 29 of the Revenue Act.

We think it is clear that Mr. Ross's contention is not sound. Section 29 imposes on each and every practicing civil engineer (including those employed by the State, county, municipality, corporation, firm or individual) an annual license tax of \$25. The parenthesis just quoted applies directly to a civil engineer who occupies the position occupied by Mr. Ross. He was not liable for the license tax imposed by the similar section in the Laws of 1923. The parenthesis was put in the section for the first time in the act of 1925. As a consequence, Mr. Ross is liable for the license tax of \$25 for the license year 1925-26, and also for the license year 1926-27. He is not, however, liable for any license tax for the year 1924-25.

Whether or not after he has paid this license tax, it will be a part of the expenses of his office for which the Mecklenburg Highway Commission is under its contract with him to reimburse him, cannot affect in any way the right of your office to collect this license tax immediately from him.

MOTOR VEHICLES—LICENSE—DODGE CARS

July 14, 1926.

I have your letter asking for a construction of the law with respect to the license tax on Dodge automobiles. You state:

Heretofore my predecessor and myself collected \$12.50 from the owners of Dodge cars, but attention was called to me some time last spring by the Chairman of the State Highway Commission that according to the horse-power rating of Dodge cars, computed according to the N. A. C. C. formula prescribed in the

Motor Vehicle Law, the horse-power of that car is 24.03 and that, therefore, the tax should be \$20. The owners of these cars and their official organization are protesting against the collection of the \$20 tax. They claim that there are different methods of rating the horse-power, that some rate it at 24, some 24 and a fraction over, and some less than 24.

With your letter you send extract from the minutes of the Highway Commission of July 6. It appears from these minutes that at that time Commissioners Cox, Hill, McGirt, and Wheatley were of the opinion that whenever the horse power of a car is a fraction less than one-half, the car should be rated at the lower full horse power, while Commissioners Page, Kistler, Kugler, Stikeleather and Wilkinson took the position that the Commissioner should take no action on the subject.

From these minutes it seems that the members of the Commission were under the impression that I had theretofore given an opinion as to the proper license tax on Dodge cars. As a matter of fact, I had not at that time been asked for an opinion and, therefore, had given none.

The law is from III C. S. 2612, as follows:

The fees for the registration and licensing of vehicles as herein required shall be according to the following schedules:

RATES FOR AUTOMOBILES

24 H. P. or less.....	\$12.50 per year
Over 24 H. P. and not more than 30 H. P.....	20.00 per year

Horse power shall be computed according to the N. A. C. C. formula of rating for all automobiles equipped with internal combustion engines.

There is no ambiguity in the act. It is so plain, it really requires no construction as that term is usually understood. In plain language it says that the license tax upon the described motor vehicles of 24 horse-power or less shall be \$12.50 and upon those of over 24 horse-power and not more than 30 horse-power, \$20. Stating it this way makes it no clearer than the words of the statute itself.

It is objected that imposing a license tax of \$20 upon a car with a horse power of 24.03 and of only \$12.50 upon one of only 24 horse-power works an injustice in that the additional .03 horse-power in effect carries an increase of \$7.50 in the tax paid. Such a classification as this is necessary in all branches of governmental activity. Always one just within or beyond the line may feel that there is no just reason for fixing it at the particular point adopted. One must be of age on election day in order to vote at that time. He may be as competent to exercise the elective franchise as he will be when he becomes of age a day later, but that does not give him the right to vote at an earlier time. In many instances one must pay a considerably higher license tax in a city having 10,001 inhabitants than another individual, following the same occupation, pays in a town with 9,999. In each instance it is within the power of the General Assembly to adopt the standard, and when the line has been run, no officer of any other branch of the government has the right to change it.

For Dodge owners and dealers the contention is made that all fractions less than one-half horse power should be disregarded. But you and I do not make the law, nor can we change it. If an administrative department can make the change because of a fractional difference, it can do so when the difference is of a full horse power. If it can be done in this instance, it can be done in all others. Utter chaos would result in the administration of the law if this should be attempted. The General Assembly has fixed the point between the lower and the higher brackets at 24 horse-power. If a mistake has been made, relief can only be had by addressing the complaint to that body.

It is not within the scope of my duties to find the facts as to the horsepower of the Dodge or any other car. That is for your Department. It would seem that it can easily be determined what the horse-power of the Dodge car is. In the words of the statute, if it is of 24 horse-power or less, you should collect a license tax of \$12.50; if it is of over 24 horse power and not more than 30 horse-power, you should collect a license tax of \$20. The General Assembly has written this requirement into the law of the land, and I advise that you are without discretion to do otherwise than follow it.

INCOME TAX—REAL ESTATE—HOLDING COMPANY

July 20, 1926.

On last Friday Mr. R. D. Douglas of Greensboro left with us copy of his letter to you dated July 15th, and requested us to advise you in regard to the point raised in that letter.

The Greenboro Bank and Trust Company owns a vacant lot which it has owned for several years and upon which it is now beginning the construction of a bank and office building as its permanent home. In order to properly finance this building, the bank organized a North Carolina corporation under the name of Greensboro Bank Building Company. To this company the bank will deed this lot and it will act as a holding company for the lot and building. The bank takes back from the holding company nearly all of its stock, amounting to \$500,000, less five or six shares of \$100 each which will be issued in the name of the officers of the bank to enable them to qualify as directors in this company.

The lot in question is carried on the books of the bank at \$138,000. The holding company is to take it over at a value of \$271,000. This, of course, is a substitution of the stock of the holding company for this land. The question presented on these facts is whether or not the difference between \$138,000 and \$271,000 is to be taxed as income for the current income tax year in which the transaction occurs. We think this does not constitute income under our act. It is evident from the statement of facts that there is no money income derived from the transaction. It is really an exchange of the real estate at the valuation for so much of the stock as would amount to \$271,000. Subsection 2 of Section 304 of the Revenue Act declares "in the case of the organization of a corporation, the stock or securities received shall be considered to take the place of property transferred therefor and no gain or loss shall be deemed to arise therefrom."

CIVIL ACTION TAX

July 28, 1926.

I have before me a letter of July 24th from Mr. B. D. McCubbins, Clerk of the Superior Court, Rowan County, in which he asks for guidance with respect to certain features of 81-a of the Revenue Act of 1925.

This section itself does not provide compensation for the Clerk in collecting the original \$2 tax. However, I C. S. 3903 provides that the Clerk shall receive five per cent commission on all taxes paid to him by virtue of his office. Construing the two sections together, Judge Calvert held that the Clerks are entitled to five per cent on the \$2 originally collected when the civil action is taken or at the termination of a criminal action. You will recall that we decided to abide by Judge Calvert's judgment and take the case no further.

Mr. McCubbins, as Clerk, is therefore entitled to the five per cent of the \$2 tax as originally collected by him. Whether this belongs to him individually or goes into the treasury depends upon the Act placing him upon a salary. It will be governed by that Act, just as all other fees collected by him.

When the costs are retaxed and paid by the defendant, this \$2 paid by the defendant, the Clerk should collect \$2 plus five per cent from the defendant so paying the cost. This five per cent is to be retained by the Clerk and is his individually, by the express language of 81-a, whether he is serving on a salary or a fee basis.

No tax is collected in a criminal proceeding until the case is finally disposed of in the Superior Court; therefore, the tax is not collectible in a criminal action in a court below the Superior Court.

In civil actions the tax is collectible upon issuing a summons in any court of record. Therefore, the tax should be collected on civil actions in the Rowan County Court.

All of the above is limited by the provision that the tax is not collectible in either civil or criminal cases, in cases within the jurisdiction of the justice of the peace. When a case within the jurisdiction of the justice of the peace goes on appeal to a higher court, the tax is not collectible.

I suggest that a copy of this may be sent to Mr. McCubbins for his guidance.

OPINIONS TO HIGHWAY COMMISSION

SURETY COMPANIES—ASSIGNEE BANK

December 8, 1924.

It seems that you have on hand funds belonging to contractors Porter & Boyd, Inc., due them on Project No. 436, Person County, and No. 856, Mitchell County. During the progress of the work these funds were assigned to the Union National Bank of Charlotte. It seems, however, that the bonding company which was surety on the contracts of these parties claims to be entitled to these funds, arising out of its equity as surety. Each of these parties has given you notice to this effect. Under circumstances of this sort, you have a right to protect yourself and the Highway Commission from the consequences of determining the matter at issue between these parties by requiring of them a bond conditioned to save the State Highway Commission harmless from any suit by the other in case you turn the funds over to either of them. Your position, of course, is that of stakeholder until the rights of the two parties are adjudicated in some way. You cannot pay the money over to one without the consent of the other.

AUTOMOBILES—STATE OWNED—DESIGNATION

March 11, 1925.

At the session of the General Assembly, recently ended, there was enacted a law, section 4 of which is as follows:

That it shall be the duty of the executive head of every department of the State Government, and of any county, or of any institution or agency of the State, to have painted on every motor vehicle owned by the State or by any county, or by any institution or agency of the State, a statement with letters of not less than three inches in height, that such car belongs to the State or to some county, or institution or agency of the State, and that such car is "for official use only."

You inquire of this office whether or not a statement to the following effect, painted or otherwise sufficiently placed upon every motor vehicle belonging to the State Highway Commission, would be a compliance with that section:

(As per memorandum attached.)

"N. C. H. C.

Official use only"

We think it would. There would be no difficulty in identifying a car so marked as the property of the North Carolina Highway Commission. We think the General Assembly did not intend to require that "North Carolina

Highway Commission" should be written out fully or painted fully upon each motor vehicle belonging to that Department of the State Government. All it requires by this section, we think, is that the car should be sufficiently identified by its mark.

AUTOMOBILES—STATE OWNED—DESIGNATION

March 13, 1925.

In your letter of March 12th you enclose a facsimile of the plate which you propose to fasten securely on all motor vehicles belonging to the State of North Carolina and used by your Department. That plate has painted upon it the monogram "N. C." in the form which was adopted by the State Highway Commission for the designation of all State highways. This is followed by the initials "H. C." All of these letters are at least three inches tall. Underneath these you have the legend printed, "For official use only" in letters about one-half inch tall. The statute which you, in attaching these plates to such cars, are attempting to obey, is as follows:

Sec. 4. That it shall be the duty of the executive head of every department of the State Government, and of any county, or of any institution or agency of the State, to have painted on every motor vehicle owned by the State or by any county, or by any institution or agency of the State, a statement with letters of not less than three inches in height, that such car belongs to the State or to some county, or institution or agency of the State, and that such car is "for official use only."

Upon this you propound two questions. The first is, have you complied with the law which requires such notice to be "painted" on every motor vehicle? Quite clearly, we think, this is a substantial compliance with this provision, if the plate is fastened securely upon the car. Second, does the statute require the legend "for official use only" to be printed in letters three inches high? If you follow the punctuation of the statute, which is the legitimate means of interpretation, this legend is not required to be printed or painted in letters three inches high. The designation of the ownership of the car clearly must be printed in letters three inches in height. Between that requirement, however, and the requirement of a statement that the car is "for official use only," is a comma, and the grammatical effect of that comma is to separate the latter provision from the former in reference to the three-inch letters.

Besides this, the object of the large letters is to inform the public and police officers that the car belongs either to the State of North Carolina or to some department of the State Government. The other words seem to be simply monitory, as a reminder to the officials or employees of the particular department involved. The act is entitled "An act to prohibit the use of public owned automobiles for private purposes." That is its main intent and purpose and this intent, we think, is fully met by the interpretation that we are putting upon the act. That interpretation, too, will save expense and very serious inconvenience.

HIGHWAY COMMISSION—RULES AND REGULATIONS

March 25, 1925.

We have considered the letter enclosed in yours and do not see that this solicitation of travelers upon the highway of North Carolina is prohibited by statute or in itself constitutes a public nuisance which can be indicted. It is quite probable that your body has authority to make a rule or regulation in regard to this with reference to the State Highway System. See subsection (e) of section 10, Chapter 2, Public Laws, 1921. If such a rule or regulation should be adopted by your body, it could only be sustained by the first sentence in this subsection.

AUTOMOBILE ACT—COMPENSATION OF EMPLOYEES

April 1, 1925.

You inquire if the State Highway Commission has legal authority under the recent act to allow employees owning their own cars compensation for the use of those cars in the State's service, such as mileage, etc. We think the recent act does not in any way impair the authority of your Commission to do this. We understand this is the method adopted both by the Agricultural Department and that of the Commissioner of Revenue, and in practice it works well.

STATE HIGHWAYS—SHORT SPURS

April 2, 1925.

It seems that in several instances in the State of North Carolina where a State highway has been constructed and hard surfaced, running into some of the larger cities of the State, traffic is so congested on these State highways and the State highways themselves as at present constructed run across grade crossings, which are a source of danger to persons who use these highways. It is proposed to remedy this condition both with regard to congestion and the elimination of grade crossings by building short spurs from the main highway and entering these cities in such way as to relieve the congestion of traffic and to eliminate grade crossings.

Some doubt has been expressed upon the authority of the State Highway Commission to build these short supplemental spurs for the purpose stated. We think that the effect of the Highway Act, Chapter 2, Public Laws of 1921, with its amendments (as interpreted by the Supreme Court of North Carolina) is to put such matters very largely in the discretion of the Highway Commission itself. There is no other body which has authority to determine the expediency if not wisdom, of this building of short spur roads. Subsection (a) of Section 10 of the Act seems to confer this discretion upon the State Highway Commission in direct terms:

The general supervision over all matters relating to the construction of State highways is one of the express powers conferred upon the State Highway Commission.

We have no doubt, then, that that body has ample statutory authority to build these short spurs for the purposes stated, if in the exercise of its discretion it should determine to do so.

SALARY AND WAGE COMMISSION—ASSISTANT ATTORNEY GENERAL

December 2, 1925.

I have your letter of November 30th in re compensation Assistant Attorney General. I am of opinion that the Salary and Wage Commission is authorized to fix the salaries and wages of subordinates and employees in the executive and administrative departments, notwithstanding the existence of the statute fixing such salaries in specific instances. This would apply to the Assistant Attorneys General.

OPINIONS TO STATE BOARD OF HEALTH

WATER SUPPLY—INSPECTION TAX

March 12, 1925.

It seems that there are cotton mills in North Carolina which supply their operatives with water from their own systems of waterworks. The only charge for water made by these cotton mills is that which is included in any rent they receive for the houses of their operatives. You inquire upon this whether or not, in the opinion of this office, water so supplied to mill villages is liable for the inspection fee provided by C. S. Section 7059. Section 7057 declares that it shall be the duty of the State Board of Health to have made in the State Laboratory of Hygiene monthly examinations of samples from all public water supplies of the State. It is quite clear that water supplied by these mills to their settlements comes within the designation of public water supplies of the State, these mill villages being in themselves more or less populous, whether incorporated or not. Section 7059, however, applies only to those water companies, whether corporate or private, selling water.

The amount of the inspection fee is fixed by Section 7060, which section provides the method by which the inspection fee shall be determined, Construing that section in connection with Section 7059, we think it quite clear that these mill companies are not liable for the inspection tax unless they sell the water to their operatives. It is not possible to estimate the amount of such tax under the rule stated in Sections 7059 and 7060.

TEMPORARY HEALTH OFFICER

May 30, 1925.

In the Matter of the Election of a Secretary of the State Board of Health

The State Board of Health shall have a President, a Secretary, who shall also be Treasurer, and an Executive Committee, said committee to have such powers and duties as may be assigned it by the Board of Health. . . . The Secretary-Treasurer shall be elected from the registered physicians of the State, and shall serve six years. . . . The Secretary shall be the executive officer of the Board and shall under its direction devote his entire time to public health work and shall be known as the State Health Officer.

These, stated briefly, are the provisions of Section 7053 of the Consolidated Statutes in relation to the election of a Secretary of the State Board of Health.

It appears that from circumstances not necessary to be recapitulated in this letter, it is not proper, in the opinion of the Board of Health, to elect a Secretary of that Board as State Health Officer at present. Upon this you inquire of this office whether or not that Board has authority to appoint a

temporary Health Officer pending further investigation by the Board as to whom they should elect permanent Secretary. We think that this is one of the powers which is necessarily involved in the constitution of the State Board of Health. It is important that some one should in the interim perform the functions of the Secretary and as it is not possible at the present time to fill the vacancy permanently, we think that this course may be adopted by the Board.

HEALTH ORDINANCE—PROSECUTION

June 23, 1925.

We see no reason why the ordinance of the city of Goldsboro set out in your letter cannot be legally enforced against any one who offends against it. If the judge of the superior court threw out a prosecution based upon the ordinance, there must have been some other reason than that stated to you by the health officer in that city. Wherever a question of that sort arises upon which there is a doubt, the prosecuting attorney may obtain a special verdict from a jury finding the facts and can appeal from the judgment of the court upon such special verdict and present any question that may be involved for the determination of the Supreme Court.

MARRIAGE CERTIFICATES—OSTEOPATH

February 17, 1926.

I have your letter of February 15th. It is my opinion that a register of deeds should accept only certificates from Physicians licensed to practice medicine and surgery upon which to base issuance of marriage licenses. He should not accept the certificate of an osteopath.

HEALTH OFFICER—ELIGIBILITY

August 23, 1926.

In your letter of the 19th inst. you state that Dr. Charles O'H. Laughinghouse of Greenville was an active member of the North Carolina State Board of Health for a number of years until his resignation June 16, 1926. On June 21, 1926, the State Board of Health elected Dr. Laughinghouse Secretary of the Board, his term of office to commence October 1, 1926. You ask an opinion of this office as to whether or not C. S. Section 7519 in any way controls the situation so as to render Dr. Laughinghouse ineligible to appointment as Secretary under conditions above stated. Section 7519 reads as follows:

Director not to be elected to position under board. It shall be unlawful for any board of directors, board of trustees or other governing body of any of the various state institutions (penal, charitable, or otherwise) to appoint or elect any person

who may be or has been at any time within six months a member of such board of directors, board of trustees, or other governing body, to any position in the institution, which position may be under the control of such board of directors, board of trustees, or other governing body.

It is observable that the terms used in the statute are "State institutions." What did the General Assembly mean by the use of these words? Did it intend that they should cover all the agencies and departments of the State Government? It is not so much a determination of the meaning of the term "institution" as defined by the dictionaries. It is, rather, what did the Legislature understand the term to mean. We have examined the statutes exhaustively and have come to the conclusion that the legislation of the State of North Carolina divides State agencies into two classes: State departments and State institutions. The distinction, broadly run, seems to be this: When the Legislature creates an administrative body to perform some of the functions of the State and delegates to it power which could be exercised by the State, but on account of numerous details necessary to this exercise, it cannot be done by the General Assembly, then that is a State department. If, however, the General Assembly sets up a distinct body, whatever it may be called, to exercise certain functions which may or may not be imposed upon the State by the Constitution, then it has established a State institution. It is not possible to draw the line between a State department and a State institution more definitely than this.

Whenever, however, the General Assembly comes to deal with these two classes of State agencies, it invariably draws the distinction between a State institution and a State department. For instance, Article 6 of Chapter 126 of the Consolidated Statutes, which chapter is entitled, "State Departments, Institutions and Commissions," deals only with officers of State institutions. For instance, Section 7517 requires the boards of directors of the various State institutions to elect one of their number as secretary. Section 7518 requires all officers and employees of the various State institutions to be elected by the board of directors. Then comes 7519, the statute particularly involved. Then Section 7520 requires the superintendents of the various institutions to be within call. Then Section 7521 forbids trading by officers and employees of State institutions with concerns in which they are interested. Section 7522 confers power upon State institutions to exercise eminent domain. (Certainly, the State Board of Health has not the power of eminent domain.) Section 7523 gives authority to managers of institutions to lay water pipes. Section 7525 permits the directors of State institutions to grant easements to public service corporations under certain conditions. Section 7526 makes injury to a water supply a misdemeanor. Section 7527 regulates keeping swine near the institutions.

When we come, however, to Section 7528, the Legislature intends to, and does, make it applicable to both departments and institutions. That deals with expenditures of departments and institutions. Section 7529 and 7530 deals specifically with certain institutions. When we come, however, to Section 7531, the Legislature intends to, and does, make it applicable to both departments and institutions. The same remark as applicable to Sections 7532, 7533 and 7534.

Whenever the General Assembly, then, means to deal with a State department as distinguished from a State institution, it does so in terms which cannot be mistaken. The various acts dealing with State institutions and departments by the General Assembly of 1925 (too numerous to be cited) all keep this distinction clearly in mind. Stated shortly, then, the department functions as part of the machinery of the State Government. The institution is set up apart to carry out functions imposed upon a modern State which are not strictly governmental in character. Consequently, we conclude that Dr. Laughinghouse under the election of June 21, 1926, will be, if he accepts the appointment, legally and constitutionally Secretary of the Board on October 1, 1926—not because of any period of time between his election and his qualifications, but simply because Section 7519 does not apply to the State Board of Health, which is distinctly and unquestionably a department of the State Government and not a State institution. There are several other departments of the State Government which in no sense can be considered State institutions, such as the State Highway Commission, the State Fisheries Board, etc.

It is noticeable also that Section 7519 uses the terms "to any position in the institution." This is manifestly wholly inapplicable also to the State Board of Health.

OPINIONS TO STATE BOARD OF ELECTIONS

AUSTRALIAN BALLOT—PORT TERMINAL BILL

October 25, 1924.

You request a ruling of this office upon the following conditions that arise from the enactment of the Australian Ballot law, applicable to nine counties in the State on August 21, 1924, and the enactment of the Port Terminals bill, also on August 21, 1924.

The Australian Ballot law above referred to in section 1 requires all questions to be submitted to the people and to be submitted in accordance with that law, whereas, the Port Terminals bill provides the machinery for the submission of the question to the people in the manner set out in section 12 of the act. There is in these two methods of voting an essential conflict. We think, after considering the matter, that the provisions of section 12 of the Port Terminals act control with reference to the submission of this particular question to the voters of the State. Therefore, it is the duty of the State Board of Elections to print and distribute ballots for said election in the form provided in this section to all the counties of the State, regardless of whether the Australian Ballot law has been made applicable to them. The General Assembly evidently intended, we think, to separate the question of the establishment of Port Terminals from all other questions to be submitted to the people at the general election of 1924. It not only provides the form of such ballots and the method by which such ballots shall be voted, but requires them to be deposited in a separate and distinct box.

It is further apparent that the General Assembly intended this to be a distinct question, uncomplicated by its consideration in connection with other questions to be submitted at the general election, from the fact that it has in no aspects of it a political or partisan tendency. The general election of 1924 is an election to select office holders for the people for the ensuing terms of those office holders. The object of the Port Terminals act is to submit to the people, free from any other consideration than the merits of the question, for their determination, whether or not the Port Terminals act shall be adopted. In this legislation the General Assembly was legislating for a particular, special purpose, and, therefore, it will be taken to control in all matters set out in the act any other legislation in regard to elections which may conflict with it.

This ruling, then, applies not only to the nine counties which were put under the Australian Ballot by the act of the special session, but also all other counties which previous to that time had been, and are now, under the Australian Ballot system.

STATE SENATE TICKET—PRINTING

May 7, 1926.

On question we were discussing this morning as to printing of tickets for members of State Senate, I call your attention to C. S. 6028 which provides that you shall certify the filing of such candidacies for the State Senate in districts composed of two or more counties when such notices have been filed with you. You will also observe that 6037 provides that the county boards of election shall print and distribute the ballots of candidates for nomination as members of the General Assembly, and on the same ballot the county officers. From this and other sections I reach the conclusion that your Board is not required to print a ticket containing the names of candidates for members of the State Senate, but that these names go on the general county ticket wherever there may be a contest, and that this is so, regardless of whether under the law the candidate for the State Senate files his notice with your Board or with the county board.

ABSENT VOTER ACT—AUSTRALIAN BALLOT

May 12, 1926.

I have your letter of May 11, asking if the absentee voter's law applies in counties where the Australian ballot law is used.

The first special act on this subject seems to have been Chapter 606, Public-Local Laws of 1917. That act applied only to Buncombe, Henderson and Madison counties. By Chapter 445, Public-Local Laws of 1925 this Chapter 606 of 1917 was made to apply to Scotland County.

I find nothing in the Buncombe County act to prevent the use of absentee tickets under it. There is no specific provision on the subject in the original act, but construing the act with the general law, I reach the conclusion that the use of the absentee tickets is permissible.

You will observe that C. S. 5968 provides that the article on the subject of absentee voting and all other election laws of the State shall be liberally construed in favor of the right of the elector to vote. My view on the subject is further confirmed by information to the effect that they have been using the absentee ballots in Buncombe County since the enactment of Chapter 606 of 1917. This is done by obtaining the ballot from the chairman of the county board of elections upon request made therefor to him by the voter who desires to use it. The details can be worked out on principles analogous to those which control in the counties under the general election law.

Chapter 37, Public-Local Laws of 1924, provides for the Australian ballot system for Stanly, Brunswick, Alexander, Yancey, McDowell, Cherokee, Surry and Caldwell. Sections 30 and 31 of that act provide the method by which the absent elector may obtain the ballots and vote. It prevents the use of certificate B as set out in amended C. S. 5962. By reference to those sections of that act, you will see the provisions on the subject.

I have not gone through the public-local laws to see what provisions may be in the acts passed for other counties. Each county will, of course,

be governed by its special act on the subject. If the special act does not prohibit the use of absentee ballots, I advise that they may be used in the counties which have the Australian ballot system. As stated, they may be used in Scotland as that act is similar to the one for Buncombe County.

PRIMARY—SENATORIAL DISTRICT

May 25, 1926.

In reply to yours of May 25. In the Twenty-eighth Senatorial District, composed of Alexander, Burke and Caldwell counties, there has been no agreement between the executive committees as provided for in C. S. 6014. Consequently, candidates for nomination for senatorship by both parties, if they wish to participate in the State-wide primary, must file their notice of candidacy with the State Board of Elections.

Mr. J. F. Spainhour of Morganton filed with the State Board of Elections as Democratic candidate. No other person filed with that body. Consequently, Mr. Spainhour is the Democratic candidate for the senatorship from that district. Though no Republican filed with the State Board of Elections, it seems that Mr. Frank C. Gwaltney has filed notice of candidacy with county boards of elections of these three counties. You ask an opinion from this office as to the effect of this filing by Mr. Gwaltney. It is very clear that it is utterly futile. He has not conformed to the primary law. He cannot thus make himself a candidate of the Republican party in that district. Sections 6049 and 6050 contemplate the printing of tickets for the general election only for candidates who have been nominated in the primary. Consequently, Mr. Gwaltney's name cannot appear upon the official ballots printed by either the State or county boards of elections at the general election in the fall.

PRIMARY—RECOUNT

June 11, 1926.

In your letter of June 8 you state that Mr. W. F. Evans, candidate in the Democratic primary for the nomination for Solicitor of the Seventh Judicial District, filed a petition with the Board of Elections of Wake County, asking for a recount of the votes cast for Solicitor in said county at the primary on June 5, alleging fraud in the conduct of said primary; that the County Board of Elections refused to grant the petition, and that Mr. Evans has appealed therefrom to the State Board of Elections. Upon this you ask if such an appeal can be heard by the State Board of Elections, and if it can order a recount in case sufficient evidence is presented to justify such action.

The only provision providing for a recount in primary elections is II C. S. 6048, which is as follows:

Election board may refer to ballot boxes to resolve doubts. When, on account of errors in tabulating returns and filling out blanks, the result of an election in any one or more precincts cannot be accurately known, the county board of elections and

the state board of elections shall be allowed access to the ballot boxes in such precincts to make a recount and declare the results, which shall be done under such rules as the state board of elections shall establish to protect the integrity of the election and the rights of the voters.

It will be observed that the recount can be had only "when on account of errors in tabulating returns and filling out blanks" the result of an election cannot be accurately known. Neither the courts nor the boards of election have power to review the action of the registrar and judges of election in passing on the right of an individual to participate in the primary. See III C. S. 6031; *Rowland v. Board of Elections*, 184 N. C., 78; *Brown v. Costen*, 176 N. C., 66; *Bell v. Board of Elections*, 188 N. C., 311.

The statute makes no express provision for an appeal from the county board of elections to the State Board of Elections. However, the State Board of Elections, being an administrative body, may treat such an appeal as an original petition and act upon it accordingly. Under II C. S. 6048, both the State Board of Elections and the county board of elections may have access to the ballot boxes to make a recount where in the judgment of either board there may have been "errors in tabulating returns and filling out blanks." In doing this, the State Board and the county board may act separately, or the two may act together under such rules as the State Board may adopt for that purpose.

By II C. S. 6043, the State Board of Elections is charged with the duty of compiling and tabulating returns and declaring the result in all primary elections except in the case of nominees for certain county and legislative offices. To that end it may, therefore, "make a recount and declare the results" upon a petition addressed to it or upon an appeal treated as an original petition in a contest involving the nomination for the office of Solicitor. It may do this only for the causes set out in II C. S. 6048. It is for the State Board of Elections to determine whether the facts and circumstances justify a recount as provided by the terms of the statute.

INDEPENDENT CANDIDATE—AUSTRALIAN BALLOT

July 9, 1926.

The letter of Mr. Lawrence Wakefield to Judge Neal, sent by you to this office for a ruling, presents an exceedingly difficult question. In counties where there has been no question of the Australian ballot law, we have invariably ruled that any one at the general election could run as an independent candidate for any county office which he might choose. His name, however, even there could not be put upon the official ballot and he must print and distribute his own tickets. This is based upon the view that the right to run for an office is incident to one's being a voter in the State of North Carolina and in the county in which he resides. The Australian ballot, however, creates an entirely different situation, particularly that set out in full in Chapter 37, Public Laws, Extra Session of 1924. That chapter applies to Caldwell County in which Mr. Wakefield is

a resident. Subsection B of Section 2 of the act plainly contemplates the possibility of there being a group of independent candidates and provides for the printing of the ballot of that group in the same way that it provides for the printing of the ballot of the two great parties. It does not state, however, how this group of independent candidates should be selected. Section 6 declares that all nominations for public office made otherwise than through official primaries shall be by the body or persons making such nominations immediately certified to the county board of elections of the proper county where it is a county ticket. If Mr. Wakefield, then, purposes to run as an independent candidate individually and not as one of a group of independent candidates, it may be that his friends meeting for the purpose may nominate him for the House of Representatives and certify that nomination to the county board of elections, and that body must print his name on the official ticket as candidate of the independent party.

It seems quite clear that if he is to be one of a group of independents running for all the county offices, or a large part of them, and nominated in this way, the county board of elections would have to print that ticket as an independent ticket under Subsection B above referred to. The only doubt is upon his being an individual independent. We think, however, that for the preservation of his rights he may be nominated in this way and run as a sole independent upon an independent ticket, to be printed by the county board of elections. If this is not done, his right to become an independent candidate would be wholly destroyed by the act. In Section 18 it is expressly declared: "No ballot except official ballots bearing the official endorsement shall be allowed to be deposited in the ballot boxes or to be counted except as hereinafter provided." The only provision thereafter made for this exception is that contained in Section 20, i.e., where no official ballots are provided at the opening of the polls or if the supply of official ballots should have become exhausted. Section 24 prohibits the judges of election and registrar from counting any ballot which is not official except as provided in Section 20.

It is manifest, then, that it is not possible for Mr. Wakefield to become an independent candidate under Chapter 37 except as herein suggested.

STATE SENATOR—PRINTING TICKET

August 4, 1926.

I have your letter of July 29. I am of the opinion that the County Board of Election prepares the tickets for county and legislative offices, which includes State Senator for the district of the particular county, and that the County must pay for the printing of these tickets.

I think that you necessarily reach this conclusion from a consideration of III C. S. 5980 (a) and (b).

OPINIONS TO COMMISSIONER OF PUBLIC WELFARE

PUBLIC WELFARE—BOW-LEGGED BOYS

October 23, 1924.

We have considered the letter of Mrs. Blanche Carr Stern, Superintendent of Public Welfare of Guilford County, in relation to the Murray boys of Altamahaw, N. C. These boys are excessively bow-legged. Some attempt has been made to induce their father to have a surgical operation performed upon them, that this condition may be remedied. He, either through poverty or unwillingness, declines to do this. You inquire whether or not the State has authority through its Public Welfare agencies to deal with this condition and compel the father to have these boys treated, or in case he is financially unable to do this, whether or not the Public Welfare Department of the county has authority to commit them to any hospital for the purpose of correcting the defect.

To both of these questions we answer "No." Section 5056 of the Consolidated Statutes gives the juvenile court of the county in which the child has a settlement authority to commit it to an institution for treatment when it is mentally defective, feeble-minded or epileptic. The condition that this statute deals with is wholly different from that presented by the case of the Murray boys. The bow legs are a physical defect, but in themselves do not necessarily impair the usefulness of the children in their lives or render them less fit to perform their duties to the State. In the absence, then, of direct statutory authority, we think it quite clear that the Welfare Department cannot deal with these children as suggested.

JOINT COUNTY DISTRICTS AND JAILS

December 12, 1924.

In your letter of December 10 you request the opinion of this office as to whether or not the General Assembly has authority under the existing Constitution of North Carolina:

First. To establish a court district composed of two or more counties in which courts should be held periodically for all of those counties thus consolidated into a single district. The Constitution of the State, Article 4, Section 10, forbids this by necessary inference. That section declares:

There shall be held a superior court in each county at least twice in each year.

The Constitution, then, must be amended in this regard if your scheme should be perfected.

Second. You inquire whether or not the General Assembly can combine two or more counties into a single jail district—that is, whether it can

allow a single jail for two or more counties. We think there would be no constitutional difficulty in the way of an act of the Legislature to this effect, Section 14 of Article 7 of the Constitution giving that body full power to modify, change or abrogate any of the provisions of Article 7, thus putting county control largely within the hands of the Legislature. It is true that Section 6 of Article 11 deals with county jails in placing the superintendents of such jails under the authority of the General Assembly in order that the health and comfort of the prisoners might be secured. We, however, do not interpret this as limiting the authority of the Legislature in that regard.

The difficulty with this branch of your plan is, it seems to us, wholly practical. The distance, for instance, of the jail from a particular court in which the prisoners are to be tried would prevent their expeditious and safe transfer from jail to the courthouse. Indeed, it would not be possible, it seems to us, to try criminal cases at a courthouse out of the county indiscriminately, as would be necessary in this case, without the county itself having at least some place of detention in which the prisoners were to be put pending the court in which they are to be tried. The saving, if any, by your plan, then, would be necessarily small and the plan itself would be accompanied by almost insuperable difficulties.

MOTHERS' AID—REPORTS

January 12, 1925.

The case stated by you in your letter of January 10 seems to relate principally to the administration of the Mothers' Aid Act and does not present directly any legal interpretation of that act. It seems that the county superintendent of public welfare in a county which has been administering Mothers' Aid held up a mother's check for \$30 for the month of December because in his judgment she did not need the money. We think the proper procedure should have been, if he was convinced that the mother did not need the money, for him to have held the check up until he could consult with the county commissioners in regard to it. If the county commissioners upon such consultation thought that the mother was entitled to the check, then it should have been delivered to her and should have appeared in the quarterly report made by the treasurer of the county to the State Board of Charities and Public Welfare under section 8 of the act. We know nothing that you can do except call the attention of the board of county commissioners to the fact that this check did not appear in the quarterly report received by your Board.

MOTHERS' AID—APPROPRIATION

March 31, 1925.

After giving careful consideration to the amendment to C. S. 5067-h submitted to me this morning, I reached the conclusion that this amendment

has reference only to the appropriations for the years beginning July 1, 1925. You will observe that it refers to "State apportionment for mothers' aid in such counties for the ensuing fiscal year."

I must, therefore, advise that this act, House Bill 1586, Senate Bill 1438, has no application to appropriations for years preceding that beginning July 1, 1925.

PENSION—WIDOW—COUNTY HOME

May 18, 1925.

We have considered the letter of Miss Anne-Ruth Medcalf, Superintendent, to you and think that she is clearly right in her interpretation of the pension law. A widow who has been receiving a pension under that law and goes to the county home, by that fact itself surrenders her pension under Section 5168(k) 3d C. S. This has been the interpretation put upon the act by the Auditor's office in the administration of the law and it meets the concurrence to this office.

MOTHERS' AID—AUDIT OF CLAIM

July 20, 1925.

Mr. Lacy has referred your letter of July 15 to me for investigation. If you will examine Section 8 of Chapter 260, Public Laws of 1923, the Mothers' Aid Act, you will find that the treasurer of each county claiming a refund from the State must furnish an itemized statement of amounts paid, duly certified by him under oath to the State Board of Charities and Public Welfare. The State Board of Charities and Public Welfare audits this account and if it is approved by it and all the regulations of the Act have been complied with, it shall certify the account (not the amount) to the State Treasurer. Whereupon, the State Treasurer shall immediately make out and forward to such county treasurer his voucher for one-half of the total amount certified as having been actually paid out by the county. It is evident from this that the voucher which the State Treasurer must rely upon is the account of the county treasurer duly certified by him to your Board and by your Board audited and approved. When that comes to the Treasurer's office, he is to pay these amounts. I have advised him that the particular amounts which you described in your letter did not revert to the General Fund under the State Budget Act, but they must be paid when properly certified.

PUTATIVE FATHER—BASTARD

August 13, 1925.

Under the conditions mentioned in your letter of August 10, the man would not be free from liability for maintenance of the child, but he having taken the insolvent debtor's oath after remaining in jail the required length of time, there is apparently no way in which this liability can be enforced.

There are hints in some of the cases that the Court might hold the father of an illegitimate responsible for its care and maintenance but that has never been definitely decided by our Court except in cases where other facts and circumstances entered in. It would not be important to determine the right except in a case where such father owned property, but it is apparent that such is not the case in the instance supposed by you.

ABANDONMENT—VENUE

October 21, 1925.

It seems from Mr. J. T. Barnes's letter to you that a wife and her children have been living in Wilson County several months, during which time her husband contributed nothing to the support of herself or her children. It seems that the husband was arrested for giving bad checks in Florida and was in jail in August, 1925. He agreed that he would take care of his family as soon as he got out of jail and had time to get straight financially. He got out of jail and has since contributed nothing to the support of his family. The jail in which he was incarcerated was the Nash County jail. His wife got out a warrant against him in Wilson County and it was served on September 30 in Wilson County. The magistrate has not heard the case because he is doubtful as to whether the proper venue was in Wilson County or in Nash County.

The justice of the peace has not final jurisdiction of such a charge. He simply has authority to bind over to some court which has jurisdiction. We think it entirely clear that a justice of the peace of the county in which the wife and children were living at the time the warrant was taken out has jurisdiction to bind over to the superior court of Wilson County for abandonment and nonsupport of the children, regardless of whether the original abandonment occurred in Nash County or not. The failure on his part to continue in the performance of his duty to support his wife and his children was in law a fresh act of abandonment and failure to support, and this having occurred in Wilson County, the Wilson County court has jurisdiction to proceed. *State v. Davis*, 79 N. C., 603; *State v. Hannan*, 168 N. C., 215; *State v. Beam*, 181 N. C., 579; *State v. Bell*, 184 N. C., 701.

DONATED FUND—EMPLOYEE

November 14, 1925.

In your letter of November 8 you state that it is advisable to supplement your bookkeeper's salary by \$10 a month from funds granted your Board by the Rockefeller Foundation. Your bookkeeper keeps the books for the Fund, and as the Foundation allows you \$150 a month for additional office help, you have devoted this \$10 a month from this Fund to paying your bookkeeper for the additional work required by the Fund instead of hiring directly another bookkeeper for this specific purpose. The Rockefeller Foundation pays to your Commission for a three year period certain funds

devoted to a specific purpose and to be administered by your Board. This Fund, of course, is no part of a State appropriation, is not derived from any State source, but is a voluntary trust imposed in your Board by the Rockefeller Foundation. Your disposition of the \$150 per month allowed you for additional office help is a matter to be determined in the legal discretion of your Board. Any employee of this Fund could be, therefore, in no sense subordinate to the Salary and Wage Commission, she or he not being an employee of the State and not being paid by the State.

Your bookkeeper, however, is an employee of the State and is subject to the rules and regulations made by the Salary and Wage Commission. That Commission has fixed her salary under the authority granted it by the General Assembly at a certain amount, to do the duties incident to her employment by your Board. There is no statute which would prohibit your supplementing the salary for the work to be done by this young lady from the Rockefeller Fund to the amount of \$10 per month.

The difficulty in the situation is that the Salary and Wage Commission not only has authority to fix salaries, but also hours of labor. One of the rules is:

No employee shall engage in any outside work which is in any way inconsistent with his obligation to the State or interferes with his rendering full time and energy to his official duties.

If this additional work does not come within the prohibition of this rule, and as to this, you as head of the Department are to determine in the first instance, we see no reason why you have not authority to allow her the \$10 per month to be paid from what is in a certain sense a private fund, subject to your control, with you accountable for its administration only to the source from which it is derived. That you, for convenience in the management of the Fund, have deposited it in the State Treasury for the purposes of the Fund, does not, it seems to me, affect your authority to devote it to its purposes free from the control of any other administrative or executive authority of the State. In other words, it is a trust fund to be administered by you and in this administration you are not at all accountable to any other State department or administrative commission.

PROSTITUTION—MAN

January 8, 1926.

The justices of the peace who discharged defendants alleged to have been guilty of prostitution because a man cannot under the statute, C. S. 4357 and 4358, commit that crime, were very much wiser than our State Supreme Court, because that body had held in three or four cases that a man could be guilty under these statutes. See *State v. Sinodis*, 189 N. C., 565, and *State v. Jesse Barbee*, 189 N. C., 835.

ADOPTION—PROCEDURE

May 29, 1926.

You ask this office to state the proceedings necessary for the proper adoption of a minor child as approved by the Court in the recent case of *Truelove v. Parker*, 191 N. C., 391.

(1) It is a special proceeding instituted by the filing of the petition by the proposed adopting parent in the superior court of the county in which the child resides, the clerk, in this regard, being the court. The essential facts to be alleged in the petition include the name, and age of the child, the names of its parents, whether the parents, or either of them, are living, and if both are dead, the name of the child's guardian, or if it have no guardian or living parent, the name of the person having charge of it. C. S. Sec. 182.

(2) The parent or guardian, or the person having charge of such child, or with whom it may reside, must be made a party of record in the proceeding. Section 183. The court holds that the term "parent" includes both father and mother, if living, and though either or both of them may have willfully abandoned the child and though that fact may be specifically alleged in the petition, that does not obviate the necessity to make him, or her, or them parties of record. There are only two ways by which one may be made a party of record:

(a) By service of summons. (b) By a voluntary appearance and this appearance must appear affirmatively upon the record.

The majority of the court in *Truelove v. Parker* held that the absence from record of an affirmative showing of service of process upon the parents or their voluntary appearance, renders the whole proceeding absolutely void, even against the heirs at law of the adopting parent. It is at this point that the dissent of the Chief Justice is most effective. He, among other things, contended that though the proceedings may, in the absence of service of process, or on appearance, be avoided by the parent, yet they could not be void against the heirs at law (privies in estate) of the adopting parent. However, the prevailing opinion is now the law of this State.

The general effect of this decision may be stated broadly thus: The statute permitting the adoption of minor children confers a special jurisdiction upon the superior court, so in order that the proceedings may be valid, the statute must be complied with strictly. Thus all the jurisdictional facts must appear upon the record, else the proceeding will be void.

OPINIONS TO THE STATE HOSPITALS

ACT OF 1925—STATE MOTOR VEHICLES

March 19, 1925.

You state that you have been operating your own car in connection with your duties as Superintendent of the State Hospital at Raleigh. At the time that you were reelected Superintendent for a period of six years, beginning at the expiration of your present term, May, 1925, the board which employed you gave you an allowance of \$600 per annum for the maintenance and renewal of your automobile. It further required that this renewal fund should be paid out of the receipts of the Institution. I suppose this means the receipts from pay patients. The board also ordered that the repairs and supplies of the machine be furnished by the Institution.

Of course, in the absence of specific legislation in regard to the situation, this act of the board was entirely legal at the time and it amounted to supplementing your salary by these allowances when you were using your own machine and not putting the State to the expense of purchasing one for your use. Unfortunately, however, the act ratified March 10, 1925, entitled "An act to prohibit the use of public owned automobiles for private purposes" contains at the end of section 3 this proviso:

That nothing in this act shall be construed to authorize the purchase or maintenance of an automobile at the expense of the State by any State officer unless he is now authorized by statute to do so.

The term "statute" has a narrow signification of an act of the Legislature as distinguished from "law" at large. There is no act of the Legislature in this sense which permitted your board to make this allowance to you for the maintenance and up-keep of your automobile.

In addition to this, and as throwing some light upon the subject, the act ratified at the recent session of the General Assembly on the 6th day of March requiring the deposit of all funds belonging to the State of North Carolina daily with the State Treasurer, requires all these receipts of your Institution from pay patients to be deposited as all other State funds are to be deposited, to the credit of the State Treasurer. This, of course, modifies materially the control of your board over these funds. The \$600 allowed you for maintenance of your automobile could be paid only through a warrant drawn by the Auditor upon the State Treasurer and from funds of the State in his hands and deposited in accordance with the act last referred to.

It seems, therefore, that as these laws are worded, the allowance to you for the maintenance of your automobile is an improper one and can no longer be sustained. It is true that the act requiring the deposits does not go into effect until the 1st of July, 1925, but the other act went into effect immediately upon ratification.

ACT OF 1925—SUPPORT OF PATIENTS

May 7, 1925.

In view of recent act of the General Assembly requiring those able to pay to bear the expense of their care, maintenance and treatment in State institutions, I am writing to suggest that you adopt every possible means to enforce the payment of these obligations. The act requires the board of directors to ascertain the cost of such maintenance and care and when that is done, "such patient, pupil, inmate, or the parent, guardian, trustee or other person legally responsible therefor, shall have the option to pay the same or to remove the patient, pupil or inmate from such institution."

It is the purpose of this act to require all those able to pay for their maintenance to do so, so that there may be a greater opportunity to care for the indigent. I, therefore, suggest that you call the attention of all those legally responsible for the care and maintenance of patients and inmates of your institution to this fact, and to insist that payment be made by them. The act further provides that upon failure of such persons to pay the amounts ascertained, this office shall bring the necessary suits in order to enforce collection. We are prepared to coöperate with you to the extent of enforcing collection whenever you find that the party responsible does not make payment.

BOARD OF DIRECTORS—COMPENSATION

May 22, 1925.

We have gone over again carefully the statutes in relation to the compensation of the board of directors of your Institution. Previous to the act of 1917, Chapter 150, P. L., the members of the various boards of the State Hospitals were required to serve without reward save their traveling expenses incurred in the discharge of their official duties. Pell's Revisal, Section 4549. The act of 1917, incorporated in the Consolidated Statutes as Sections 6156 to 6159 inclusive, gave the members of the joint board of directors in Section 6158 \$4 per day and actual expenses while engaged in the discharge of their official duties. Those sections were repealed by Chapter 183, Public Laws, 1921, Section 6158 specifically. That act also unscrambled the eggs previously scrambled in 1917 and restored the management of each one of the State Hospitals to its own particular board of directors. Neither that act nor any subsequently passed, including those of the session of 1925, deal at all with compensation for these boards of directors. Consequently, we are clearly of the opinion that they are entitled under the old act to their traveling expenses incurred in the discharge of their official duties and nothing more, nor can the board of directors by any resolution or act of theirs provide a per diem for themselves.

POWER LINE—CONTRACT

June 15, 1925.

We have examined carefully the contract submitted to you by the Southern Railway Company in relation to the existing electric light lines and telephone lines now constructed across the right-of-way of the Southern Railway Company on lands belonging to the State Hospital. We are entirely clear that your institution has no authority to sign such a contract. The railroad company at best has only an easement in the right-of-way across the lands of the State Hospital. If, therefore, your telephone or electric light lines are erected in such way as not to interfere with the right of the Southern Railway Company to use its right-of-way for railroad purposes, then you have done all that the law requires you to do. This contract was evidently drawn for power companies and telephone companies crossing the railroad track and would be appropriate for such private corporations. It is in no sense appropriate or proper for a State institution to attempt to bind itself in accordance with the provisions of this contract, particularly articles 4 and 5 of the same. If your institution, through its board of directors, were to sign this contract, it would be invalid as beyond its powers.

COUNTIES—INDIGENT INEBRIATES

October 12, 1925.

You ask in your letter of October 10th an opinion from this office relative to the obligation of counties to pay the cost and expense of the restraint, care and treatment of indigent inebriates as defined in Chapter 156, Public Laws of 1921. That statute plainly imposes the cost of such care and treatment upon counties when the patient is an indigent inebriate as defined in C. S. Section 2284, and also as defined in section 2 of said Chapter 156, with this limitation: That there shall not be included in such cost and expense any charge except for board and clothing. This obligation upon the counties is imposed in specific terms in Chapter 156 as to both classes of inebriates. You will find an interpretation of this act in this regard by Judge Manning at page 195 of the biennial report of the Attorney General's office for 1921-22.

BOARD OF DIRECTORS—COMPENSATION

December 11, 1925.

We think that in relation to the compensation of members of your board of directors, resort must be had to section 4549 of the Revisal of 1905. The last clause of that section declares:

Members of each board shall serve without reward save their traveling expenses incurred in the discharge of their official duties.

The Bickett act of 1917 was brought forward in the Consolidated Statutes of 1919 as sections 6156, 6157 and 6158. Section 6158 provided compensation in the sum of \$4 and actual expenses while engaged in the discharge of their duties. Chapter 183, Public Laws of 1921 repealed definitely and specifically the above sections. Section 3 of the act of 1921 confers all the powers and duties theretofore imposed upon the consolidated boards upon the several boards of the respective institutions. This repealing act, however, does not provide any compensation for any of these boards and seems to refer back to existing laws after the repeal for a definition of the duties and responsibilities of these several boards. We think the effect of this repeal is to revive section 4549 of the Revisal of 1905 above referred to.

COUNTY CONVICT—INSANE

March 22, 1926.

In reply to yours of March 20th. You ask how is a prisoner serving a sentence on the county roads or in the county jail, who has become insane, committed to the insane department of your institution? We have not been able to find in the statute any special machinery for the commitment of such insane prisoner to the hospitals. The ordinary proceeding, then, in the case of any insane person is to be used. C. S. Section 6195 permits a justice of the peace in an emergency to hold the examination of a particular person charged with insanity, but after this examination the clerk of the court must commit the person, if he is found to be insane, to the proper hospital. Under Section 6236 a justice of the peace may commit a party charged with crime before him to the hospital for the dangerous insane when the justice of the peace has original jurisdiction of the offense charged and it is ascertained at the time of the arraignment of the person so charged that he is insane, or, if he is held not guilty on that trial, on account of insanity. This is the only instance that we have been able to find where a commitment of a justice of the peace is valid.

INMATES—COUNTY HOME

June 7, 1926.

I have considered carefully the matter submitted to this office by you and Mr. Nathan O'Berry a few days ago. It seems from your statement that a number of counties are carrying certain inmates of their county homes before the clerk of the superior court of the particular county and demanding that those inmates after proper investigation be committed to the State Hospital for the Insane at Goldsboro. In this way the room devoted by the State for the care, attention and treatment of other patients is being monopolized by patients from county homes. Upon this you inquire whether the statute compels you to receive patients so committed to your Hospital.

In 1919, Chapter 326, Public Laws, sections 1 and 6, the General Assembly enacted "that any resident of North Carolina who has been legally adjudged to be insane by the clerk of the court or other properly authorized person in accordance with the provisions of the law shall be entitled to immediate admission into the State Hospital at Morganton or the State Hospital at Raleigh or the State Hospital at Goldsboro, in accordance with the principles of division as to race and residence prescribed in the law." The statute then goes on and prohibits the superintendent of a particular hospital from refusing admission to such a patient.

This act has been brought forward in the Consolidated Statutes as 6184. It is, consequently, to be construed in the light of other statutes which are enacted upon the same subject. It is a universal principle of statutory construction that the General Assembly should not be taken to have commanded an impossible thing or one which in its operation would bring about results fatal to the usefulness of the particular institution involved. Construed literally, this statute having been enacted since the other provisions of the statute hereinafter alluded to, except one, would require you to receive idiots, those whose minds have been impaired by senility, and utterly regardless of whether or not you had room for the reception of the patients. We think the Legislature did not intend such a result as this. We think they were referring to the general run of patients committed from the outside world to the State Hospitals, and we are further of the opinion that this section of the Consolidated Statutes is controlled and modified by its immediate context. The very next section declares that no idiot shall be admitted to the Hospital. Section 6185. Section 6186 gives the board of directors power to make regulations regarding the admission of patients, having in view the curability of patients, the welfare of institutions and the exigencies of particular cases.

Section 6196 requires you to admit patients only when there is room for them at the Hospital. This particular provision as to room at the Hospital was reenacted in Chapter 144, Section 1, of the Public Laws of 1921, which was, of course, subsequent to the act of 1919. It would, of course, be foolish to crowd patients into a particular hospital in such way as to impair the efficiency of the hospital and the cure and care of other patients who have been previously committed. Sections 1335 *et seq.* impose the burden of the care of the county poor upon the various counties of the State. This is an obligation to which the counties have been responding throughout the history of the State. Consequently, the act of 1919, Section 6184, *supra*, must be interpreted in the light of these provisions. When, therefore, a particular county undertakes to drop upon the State the care of its poor through the use of machinery provided in the act and upon an allegation that a particular pauper is insane, we think that you have a right to investigate the actual fact of insanity, its curability, and whether or not it is dangerous for the pauper to be retained in the county home, before you could be compelled to receive them directly from this county home or to keep them after ascertaining that if they have insanity, the form is harmless. It is only to this limited extent that we think Section 6184 is applicable to county paupers.

APPOINTMENT OF RELATIVE

June 21, 1926.

I have your letter of June 19th. You state that Mr. H. B. Bowden of Duplin County has applied to you for a position in the State Hospital; that his great grandmother was a sister of your grandmother and you, therefore, ask if your employment of him for the Institution would be a violation of the law.

The law on the subject is II C. S. 5012, which is as follows:

Relatives ineligible to appointment in state institutions. No person shall be appointed to any place or position in any of the State institutions under the supervision of the State Board who is related by blood or marriage to any member of the State Board or to any of the principal officers, superintendents, or wardens of State institutions.

The relationship between you and the young man is so far removed that it does not come within the evil aimed at or the purpose contemplated by this statute. I am, therefore, of the opinion that you may properly employ him.

OPINIONS TO THE ADJUTANT GENERAL

DISBURSEMENTS—DELAYED CHECK

May 4, 1925.

It appears that funds appropriated by the General Assembly of North Carolina for the benefit of the National Guard of the State, as well as those derived from the Federal Government, are disbursed by checks of the State National Guard Disbursing Officer, whose office is in Oxford, N. C. These checks thus drawn are sent generally to the captain of the company whose members are entitled to certain payments provided for by the State of North Carolina. It appears that quite frequently checks so sent to individual members of the various companies in the State for some reason do not reach their ultimate destiny; that at the present time there are about \$8,000 of these checks outstanding, some of them one and two years old, which have never been presented for payment in due course. You ask the opinion of this office as to whether or not the Governor, as Commander-in-Chief of the National Guard of the State, has authority to make, through you as representing him, rules and regulations to meet this situation.

The rule which you suggest is in general terms this: All checks so issued by the Disbursing Officer must be presented for payment to the bank on which they are drawn within sixty days of their issue. If not so presented, the old check is to be returned to the disbursing officer that he may in a proper case issue a new check for the amount of the old check unused. The object of this, of course, is to render void all outstanding checks after the lapse of sixty days from their date, leaving intact, of course, the authority of your office to issue new checks when convinced that this should be done. We think that you have this authority by virtue of your position as acting for the Governor, Commander-in-Chief of the National Guard within the State. It is necessary to do this, both to protect the State and to secure the rights of the individuals to whom the checks are payable. There is no danger of any one losing the amount when he is entitled to it, and makes such showing to your office as to justify you in issuing a new check.

COURT MARTIAL—SERVICE OF PROCESS

December 17, 1925.

You ask the opinion of this office as to the duty of a sheriff, constable or other police officer to carry out the sentence imposed by a court martial acting under the powers conferred by the Consolidated Statutes regulating the militia of the State.

Upon the imposition of a proper sentence in accordance with the law on the subject, the military court should issue its process to the sheriff of the county wherein such court is held. When such process reaches the

hands of the sheriff it becomes the duty of such officer to execute the sentence therein imposed. He should execute the process and the sentence should be carried out in the same manner that such sentences are carried into effect in criminal cases determined in the courts of the State. The procedure with respect to this is set out in C. S. 6833 and 6834.

You tell me that the officers of Henderson County refused to execute the process issued to them by a court martial regularly held and its findings approved in the regular way. I suggest that this failure on their part be called to the attention of the Governor and that he, chief executive officer of this State and as commander-in-chief of the militia bring this duty to the attention of the officer to whom the process has issued. It may be that the officer refusing to recognize and execute the process so issued to him may be inadvertent to his duty in the premises and will perform that duty when it is called to his attention.

If the duty is not performed, upon your calling it to the attention of this office we will advise you further, and endeavor to assist you in the matter.

POWER LINE—AUTHORITY TO SELL

December 18, 1925.

After considering the question propounded by you to this office, we have come to the conclusion that your Department has authority to sell the power line erected by you from the connections of the power plant of Morehead City to that city, of course, accompanying the sale with an adequate contract to provide service to Camp Glenn for reasonable rates. It seems that the city proposes to extend its power line to a new development on the sound west of Camp Glenn and its purpose after taking over the line erected by your Department is to extend its power and light development to the Morehead Heights suburb of the city. We think if this plan is carried out, it would tend to make the service at Camp Glenn better and at the same time be much more convenient and efficient way for the city to distribute its light and power manufactured by it.

OPINIONS TO STATE CHILD WELFARE COMMISSION

UNAUTHORIZED AGENTS

November 8, 1924.

You complain of unauthorized persons who have sought to secure information from the local offices of agents appointed by your Board. Not only this, they induce these local agents to permit them to accompany them upon inspection of industrial plants. You inquire upon this whether or not the Child Welfare Commission has authority to control the situation by rules and regulations adopted by it. We think it quite clear that the Consolidated Statutes, Section 5031, does give the Commission this authority. The statute nowhere seems to make the violation of the rules and regulations of the Commission a misdemeanor, consequently, we think that the power of the Commission extends no further than to prohibit the local agent from submitting his records to these unauthorized persons or to permit such unauthorized persons to accompany him on his tours of inspection.

This, stated shortly, answers all of your questions except the last two. One of these is, can the law be amended so as to give adequate protection against such unauthorized persons. Clearly the answer to this should be, yes.

The last question is, whether or not an unauthorized person assuming to be an agent of the State Child Welfare Commission without any credentials at all and acquiring access to the records of the local office under such false pretense, is punishable under the North Carolina law. We can find no law in the statutes which fits the situation, consequently, in the opinion of this office the answer to this question should be, no.

CHILD LABOR—PUBLIC ENTERTAINMENTS

February 21, 1925.

You state the following conditions, upon which you ask the opinion of this office: A child seven, eight or ten years of age is found traveling with its parents on an itinerary of a week or two in the State. This child is engaged to present plays in places of public amusement and generally is accompanied by its parent or parents. The parents, company or troupe contracting with the child to play for salary or percentage of receipts, claim that it is receiving public school instruction according to the standards of their own state and present signed statements indicating the approval of the course and standards of instruction imparted to the child. Upon this you present the following questions:

(1) Does the compulsory school law of North Carolina apply to such child appearing as a performer in places of amusement? Answer, "No." This

child is in no sense a resident of North Carolina, but is simply a temporary transient, and to such temporary transients the compulsory school law, C. S. Section 5758, by its own terms does not apply.

(2) The answer to your first question answers the second.

(3) Does the possession of a certificate issued for employment of a child in the state in which the parent has a domicile justify his appearance upon the stage while completing itinerary performances in places of amusement in North Carolina? No. On the contrary, the law of North Carolina being in itself founded both upon the State's police power and its paternal power, is applicable as well to those temporarily in the State as it does to actual residents. C. S. Section 5032 expressly prohibits the employment of a child under fourteen years of age in (among others) places of amusement. In order, however, to alleviate the strictness of this drastic provision, the statute permits the Commission to make regulations which in themselves would create exceptions to the statute. We think it clear that the Commission has the right to make a rule or regulation which would permit these children coming from without the State to perform in places of amusement, subject, however, to the limitation contained in C. S. Section 5033. That section contains an absolute prohibition against the employment of persons under sixteen years of age between the hours of nine p.m. and six a.m. The Child Welfare Commission is given no authority in that section to create any exception to its provisions. Consequently, the Child Welfare Commission may permit these children to perform in places of amusement at any time during the day between six a.m. and nine p.m.

(4) This seems to answer your fourth question also.

(5) Is the act intended in any way to regulate the performance of children in entertainments or plays presented by a fraternal, educational or charitable organization having for its object the promotion and maintenance of such institution, when the child without compensation and without control of those in charge of the entertainment is permitted by its parents to take part in such entertainments? We think not.

CHILD LABOR—CADDY

April 8, 1925.

You ask an opinion from this office as to whether or not a child over fourteen years of age but under sixteen must present age certificates under C. S. Section 5034 if he is employed as a caddy on a golf course. C. S. Section 5032 contains an absolute prohibition of the employment of a child under fourteen years of age in or about or in connection with any laundry, bakery, mercantile establishment, office, hotel, restaurant, barber shop, boot-black stand, public stable, garage, place of amusement, brick yard, lumber yard, or any messenger or delivery service, public works, or any farm or street trades. This section goes on and gives the Commission authority to moderate the strictness of the prohibition by rules and regulations. It then contains certain named exemptions which are not material to this discussion. Section 5034 deals with children over the age of fourteen but under

the age of sixteen years in the particular industries outlined and defined in Section 5032. While it is quite clear, we think, that the term "place of amusement" used in Section 5032 does not include a golf course, yet it might include a child under fourteen years of age and it would not include one over fourteen years of age, when interpreted broadly and liberally.

We suggest, therefore, as a means of avoiding this difficulty that your Commission deal with these caddies and their employment on a golf course under the authority given to it to make rules and regulations in regard to such employment.

APPROPRIATION—UNEXPENDED BALANCE

May 27, 1925.

Your first question is, will the contracts made for survey and material approved by the Commission hold intact the unexpended balances of appropriations for this purpose after July 1st?

Section 19 of the executive budget act is as follows:

No department, bureau, division, officer, board, commission, institution, or other State agency receiving an appropriation covering the biennial period shall expend more than one-half of such appropriation during the first year of the biennial period, and all unexpended appropriations shall revert to the State Treasury to the credit of the general fund at the close of the biennial fiscal period; except that capital appropriations for the purchase of land or the erection of buildings or new construction shall continue in force until the attainment of the object or the completion of the work for which such appropriations are made. The reversion of unexpended balances of appropriations provided for in this section shall not take effect prior to the beginning of the next fiscal year after the ratification of this act, and shall not apply to appropriations heretofore made by the General Assembly and paid out by the State Treasurer.

You will observe from this that it is declared that the reversion of unexpended balances shall not apply to appropriations heretofore made by the General Assembly and *paid out by the State Treasurer*. This last clause necessarily modifies the ruling heretofore made by Judge Manning in regard to such unexpended balances when contracts had been made. It seems to contemplate that the appropriation must have been paid out by the State Treasurer to your Department to prevent a reversion of the balances to the general fund.

Second. Will the executive order for the 5 per cent reduction affect such unexpended balances for survey and contracts? We answer, No; it affects only appropriations made for the fiscal year 1925-26.

SEPARATE TOILET—POSTOFFICES AND COURTHOUSES

June 19, 1925.

In your letter of June 19th you inquire whether or not in the opinion of this office the act of the Legislature requiring employers to provide seats for their female employees, and that requiring them to provide separate and distinct toilets for sexes and races, are applicable first, to Federal postoffices, and second, to county courthouses. We answer "No" in each instance; first, because the statutes by their terms do not include such employers, and second, in the case of the Federal postoffices, the Legislature itself could not make them applicable to such Federal agencies.

CHILD LABOR—PROJECTION OF A FILM

September 8, 1925.

You propound the following questions to this office:

1. Is a child under fourteen years of age, engaged in the production of a film which has its setting in a cotton field or country background, separate and apart from a place of amusement, subject to the provisions of the Child Labor Law as contained in Section 5032?

A. Section 5032 in its first clause contains an absolute prohibition to which there are no exceptions. That prohibition is as follows:

No child under the age of fourteen years shall be employed or permitted to work in or about or in connection with any mill, factory, cannery, workshop or manufacturing establishment.

It is manifest that this employment as stated by you in your question is not in any mill, factory, cannery or manufacturing establishment. If it should be by very liberal construction of the language in connection with a workshop, the term "workshop" would be extended beyond its definition as contained in the rules of your Commission at page 17 of your biennial report, 1922-24, i.e., "a workshop is a place where any manufacturing or handiwork is carried on."

It is true that the photographers and other employees of the film company are engaged at labor at the time, but it is not labor in or about or connected with a workshop or manufacturing establishment. The actors, however, whose pictures are taken that the film may be thereafter developed and perfected are not engaged in any labor defined in Section 5032, as we understand that section. We think the statute should be construed liberally to effectuate the purpose for which it was enacted, but we are not willing to extend it beyond the legitimate signification of the terms used therein.

We do not think a child under fourteen years of age when under the protection of its parents and guardians who is thus photographed while acting a part in a cotton field or with a country background is doing any work in the signification of the term as found in the statute and as defined by your Commission in its rules and regulations. Of course, we must

be understood as excluding from consideration in this opinion any improper or cruel use of the child to make pictures.

There is, however, in the remaining clauses of Section 5032 another prohibition upon the employment of children under the age of fourteen years in connection with any laundry, etc. As to the particular industries and character of work described in the statute, there is a saving clause which permits the Child Welfare Commission to make rules and regulations which modify its stringent provisions. The making of films is not included either specifically or by inference in the classes of labor defined in this particular part of the act. It is true, the term "place of amusement" is used in the act, but this, we think, does not include the making of films and being photographed by the film maker under the circumstances stated in your question. We think the definition given by you and your Commission at page 21 of "place of amusement" is strictly correct and this does not include the conditions stated above.

2. Do the words "shall be employed or permitted to work in or about or in connection with any mill, factory, cannery, workshop or manufacturing establishment" intend to prevent the presence of a child in and about such places, though it is not there engaged in any work, employed to work, or permitted to work in such places?

A. We think not.

CHILD LABOR—EXHIBITION

September 22, 1925.

You submit to this office a letter from one S. E. Lowe, whose postoffice seems to be Ararat, N. C. The letter was originally addressed to the State Board of Health and has been going the rounds until it finally got to your office.

Mr. Lowe requests permission to take a water-headed child, in good health, to the Greensboro Fair. The age of the child is five and one-half years. His purpose in taking the child to the Greensboro Fair is to exhibit it before the crowd who attends the Fair as an abnormality. We think you have not authority to give this man this permission.

HOURS OF LABOR—WOMEN

February 27, 1926.

You ask of this office an interpretation of C. S. 6554 with reference to the hours of labor of women in industrial enterprises. That section is as follows:

Sixty hours shall constitute a week's work in all factories and manufacturing establishments of the State, and no minor nor woman shall be worked in such factory or establishment a longer period than sixty hours in one week and no adult male shall be

worked in such factory or establishment for a longer period than sixty hours in one week unless there shall be a written contract entered into between said adult male and his employer to that effect in which the employer shall agree to pay said adult male extra compensation for extra hours he may work. No employee in any factory or manufacturing establishment in this State shall be worked exceeding eleven hours in any one day: *Provided*, this section shall not apply to engineers, firemen, superintendents, overseers, section and yard hands, office men, watchmen, or repairers of breakdowns.

That section puts adult females on the same footing as adult males with this exception: a woman may not be worked a longer period than sixty hours in one week. An adult male may by special contract work longer than sixty hours in a week, provided the employer shall agree to pay said adult male extra compensation for the extra hours he may work. This provision with reference to adult males is, however, controlled by the following clause that he shall not be worked exceeding eleven hours in any one day.

The hours of labor, then, of an adult female may be stated as not exceeding sixty hours for each week. She may be worked a particular day as much as eleven hours, provided that the week's work does not exceed sixty hours. She may not be worked at any time more than eleven hours per day.

This section containing a positive prohibition against exceeding the hours of labor so specified, but not having in the statute any penalty provided by which the employer may be punished for exceeding the hours so fixed, we understand that the general rule applicable to such cases would apply, and that an offense against this act would be a misdemeanor at common law, no specific penalty having been provided in the act.

OPINIONS TO SUPERINTENDENT OF THE STATE'S PRISON

TRANSFER

September 2, 1924.

I have examined Chapter 165 of the Public Laws of 1923, entitled "An act to abolish the State Hospital for the Dangerous Insane and to provide for the commission and care and cure of such insane at other State hospitals." Section 12 of that act provides that:

The patients now confined in the State hospital for the dangerous insane shall not however, be transferred as herein provided from such hospital to the other hospitals *under* the superintendent of the State Hospital for the Insane at Raleigh and the superintendent of the State Hospital for the Insane at Goldsboro notifies the Superintendent of the State's Prison that they are ready to receive such patients.

I think it is apparent that the word "under" must have been intended for "until," as it is not grammatically correct as it stands.

You do not state in your letter that you have been notified by the Superintendent of the Hospital for the Insane at Raleigh and at Goldsboro that they are ready to receive the dangerous insane from the State's Prison. If you have received such notice, then you can transfer them by sending these dangerous insane under guard to the respective institutions with a certified copy from your office of the commitment and a certified copy of the report of the Prison physician that such patients are still insane. This refers to whether the dangerous insane are men or women. I think it is up to the hospital, if it has notified you, to receive such persons and care for them in the insane institutions until they have been restored to reason. If their reason is restored before their terms of imprisonment are concluded, then they must be returned to the State's Prison, to serve the sentence imposed by the Court.

INSANE CONVICT—COMMITMENT TO HOSPITAL

January 23, 1925.

You state in your letter that you have a convict located at the State's Prison here who has become insane and you inquire of this office what procedure should be taken in order that he should be admitted to the department for the dangerous insane in the State Hospital at Raleigh.

We think it quite clear that before the State Hospital can receive such insane convict, proceedings must be taken out under Sections 6193 *et seq.* of the third volume of the Consolidated Statutes. Section 6238 is as follows, so far as material to the question presented:

All convicts becoming insane after commitment to the State Prison, *and the fact being certified as now required by law in the case of other insane persons*, shall be admitted to the hospital designated in Section 6236.

The only way that such fact can be certified as required by law is to comply with the provisions of Sections 6193 *et seq.* as above suggested.

COMMITMENT—FIVE YEARS

April 7, 1925.

You inquired today if C. S. 7716 meant that the Board of Directors of the State Prison Department could refuse to accept prisoners other than those sentenced for a term of five years or more. Confirming what I said in our telephone conversation, I have to say that I do not so construe this section.

This section simply provides that prisoners given sentences of five years must be sent to the State Prison. It is my opinion that a judge has the right to sentence any person convicted of a felony to the State Prison and that it would be the duty of the Board of Directors to receive such prisoner under the commitment following such sentence.

MEMBERS OF BOARD—COMPENSATION

June 12, 1925.

You state that Mr. Henry K. Burgwyn and Mr. B. B. Everett compose a subcommittee on Caledonia Farm, and by request of the Governor and instructions of the Board they visit Caledonia Farm Thursday of each week to assist in directing farming operations and attending to any other official business which may arise.

Upon this you inquire whether or not these gentlemen are entitled to per diem and mileage each time that these services are rendered. We think they are under Section 7709 as amended by the recent act of the Legislature. Part of this section is as follows:

Each member of the board of directors shall receive as compensation for his services four dollars per day for such days or fractional part thereof as he may be engaged in the duties of said board, together with five cents per mile traveled while in the discharge of his official duties.

CONVICTS—HOURS OF LABOR

June 25, 1925.

I have your letter of June 23d, asking if the State's Prison Department may work prisoners therein eleven hours a day for five days in the week

and five hours on the sixth day. You state that this is desired by the prisoners themselves and that it will enable them to stop work at 11:30 on Saturday and have Saturday afternoon for some form of amusement.

You state in your letter that under the law you are not allowed to work prisoners on contract work exceeding ten hours per day. I suppose that you are referring to C. S. 7726 as it existed prior to the recodification of the law in regard to the Prison as adopted by the General Assembly of 1925.

That section as originally written did limit the hours of work to ten hours per day, but if you will observe the new statute, you will see that that provision is left out of C. S. 7726 as rewritten.

I have this morning gone through the new act to see if this limitation is contained in any other section of it. I do not find such and it is, therefore, my opinion that the board of directors have general control of these matters of detail as generally set out in the act but specifically in Sections 7706 and 7707. I, therefore, advise you that you may work these prisoners in the manner suggested.

We have a general statute limiting the hours of labor in all factories and manufacturing establishments to sixty hours in one week and not exceeding eleven hours in any one day. I do not think that this statute would have application under the facts submitted by you, but this expression of the law making body with respect to the hours of labor generally would indicate that the hours therein provided for are approved by the Legislature.

STATE PRISON FARM—WHEAT

July 27, 1925.

We see no reason why you should not have wheat raised on the State's Prison Farm ground to supply prisoners with proper food. Of course, an adequate account will have to be kept of the amount ground, including a statement as to the purposes to which it was devoted.

HONOR PRISONER—TRUCK DRIVING

September 2, 1925.

If the State Prison authorities have an honor prisoner which they can trust to drive a truck on which school children are transported, we know no reason why they should not do so without the Prison incurring any liability therefor. The county cannot assume any liability for any person or property damaged or injury which may be caused, directly or indirectly, by the default or neglect of this honor prisoner while driving the truck. Consequently, that portion of the resolution of the Prison Board would be inoperative, and quite probably the county would refuse to accept the plan suggested by you with this provision in it.

STATE PRISON—CONVEYANCE OF LAND

September 4, 1925.

As you will probably recall, the law with respect to the State Prison was entirely rewritten by the 1925 Legislature. It is Chapter 163, Public Laws, 1925. From C. S. 7705 as rewritten you will see that a conveyance of the kind submitted must be approved by the Budget Bureau and the Governor and Council of State and the conveyance executed in the name of the State of North Carolina by the Governor and attested by the Secretary of State. I will approve the conveyance of easement in the manner required by the new act on the subject.

I have printed copy of the act of 1925 and herewith send manuscript copy of the act for your use.

You will also observe that the State Prison is now designated the State Prison Department.

TRUSTIES—STATE HIGHWAYS

November 20, 1925.

You will find the statute under which you would act in assigning prisoners to work upon the State highways in section 7712 as incorporated in Chapter 163, Public Laws of 1925. The provisions there are not as minute and stringent as they are in sections 7758 and 7759. We think, therefore, that if your Prison Board authorizes it, you may adopt the course suggested in your letter with reference to working trustees upon the State highway where these trustees are worked by the State Highway Commission and not by a contractor under that Commission.

STATE PRISON—PURCHASE OF REAL ESTATE

December 3, 1925.

Before the State Prison Department can purchase additional real property, it must obtain in the first instance the approval of the Budget Bureau and Governor and Council of State. After such approval is obtained, the abstract of title of the land proposed to be purchased must show to the satisfaction of this office that the title is good and sufficient in law. If the abstract is approved, then the deed is to be made to the State of North Carolina.

There are practical difficulties in our defining beforehand what is a good and sufficient abstract of title. We can only say that it must show title in the party proposing to sell free from claim or claims of any other person, unless those claims may be satisfied from the purchase money at the time of the transaction.

STATE BOARD—RELATIVE

February 6, 1926.

In your letter of February 5th you ask: "Please advise this office if it will be a violation of the law for the State's Prison to employ the son of a second cousin of a member of the board of directors of this institution."

In my opinion such employment would not be in violation of the law.

COMMITMENT—UNCONDITIONAL

July 19, 1926.

If a prisoner is committed to the State's Prison regularly—and it seems from the papers enclosed in your letter that Louis Dempsey was so committed—he comes under your jurisdiction as any other prisoner except as provided in section 7741, Chapter 163, Public Laws of 1925.

DISCHARGED CONVICT—ALLOWANCE

August 9, 1926.

In Re Walter M. Pyrtle

Section 7725 of the new Prison Law, Chapter 163, Public Laws 1925, authorizes the Board of Directors of the State's Prison, with the approval of the Governor and the Commissioner of Public Welfare, to make such rules and regulations as may be necessary to accomplish the purpose of the section, and under such rules and regulations, they may direct the payment of such sums to prisoners at the expiration of their sentences as may in their judgment adequately aid prisoners in securing employment and in defraying their expenses to the place of such employment.

Pyrtle was convicted at the last October term of the Superior Court of Catawba County of murder in the second degree and was sentenced to from fifteen to twenty-five years in the State's Prison. Pyrtle appealed from this judgment to the Supreme Court and suspended the execution of the same by making affidavit to be allowed to appeal *in forma pauperis* and the Court ordered that such appeal should be allowed. The appeal itself under our statute did not vacate the judgment, but the order permitting the defendant to appeal *in forma pauperis* suspended the execution upon such judgment. That thereafter Pyrtle was carried to the State's Prison was for his own protection, and his being allowed to work was at his own request. The Supreme Court of North Carolina on the appeal, granted a new trial, and the case coming on to be heard on such new trial at the Superior Court held in Catawba County in July of the present year, the defendant entered a plea

of nolo contendere on the charge of manslaughter. The Court sentenced him to four months in the State's Prison and allowed him upon this sentence credit for the time he had already served in the penitentiary and in jail. As a consequence, Pyrtle was discharged. Thereupon he claims that he is entitled to the sum of money allowed by the Board of Directors under section 7725 to discharged prisoners.

We are very clearly of the opinion that unless the rules and regulations of your Board provide specifically for such a case as this, the claim is not well founded and so you have no authority to allow it.

OPINIONS TO COMMISSIONER OF LABOR AND PRINTING

STATE PRINTING—COMPENSATION

June 23, 1925.

At the request of Honorable A. W. McLean, Governor of the State, we have investigated the claim of Edwards & Broughton Printing Company against the State for the balance alleged by that company to be due it in consequence of the failure of the Commissioner of Labor and Printing in the fall of 1924 to allow them the amount set out in their bill for printing Volume 5 of the Bulletin of the Geological and Economic Survey, entitled "Cretaceous Formations of North Carolina," and have come to the conclusion herein set out in this letter.

According to the State contract with the public printers, composition falls into three classifications, namely: single composition for the average run of work, composition and one-half for more difficult work, and double composition for work of extreme difficulty such as tabular matter and items of that class. The Edwards & Broughton Printing Company claimed that on account of the peculiar class of work done in printing the above described bulletin, they were entitled to pay for composition and one-half. The former Commissioner of Labor and Printing allowed compensation for only single composition. This, then, is the issue made by the parties to the controversy.

The evidence upon this issue was, first, that of Major Harris, acting Director of the present State Board of Conservation and Development, successor to the former Geological and Economic Survey, that the work done by Edwards & Broughton upon this publication was up to contract and entirely satisfactory to that department. Second, evidence from the Observer Printing House, Charlotte, N. C., that of Joseph J. Stone & Company, Greensboro, N. C., and the Cary Printing Company located at Bethlehem, Pa., as to the class of work done in the composing of the volume above mentioned. In addition to this testimony was the oral testimony of Mr. Wallace Seeman, one of the managers of Seeman Printery, Durham, N. C., on the same point. These witnesses are all unanimous to the point that the printing done in getting out this Volume 5 was clearly double composition and so is entitled to double price. We send herewith copies of letters written by the various printing establishments above mentioned upon this point.

The reason given for putting the composition upon this book in at least the second class of composition and one-half, is that from its technical nature and its use of unusual, some times Latin, terms, the composition itself is very much slower than that of the average run of work. In setting up the average run of work, the linotyper may carry in his mind from one glance at the copy a whole sentence and thus can operate his machine without delay. The copy, however, in this book, requires him to spell out particular words and transfer them through the linotype machine to the printed page, hindered and limited by this fact. Printers are paid by the week for their work. It is manifest, then, that where copy is of

the character of that in this book, the printer does the work very much more slowly than he does the average run of work. Thus, the expense of doing it is considerably increased to his employer. An inspection of the book, a copy of which is herewith sent, shows that this contention is sustained by the text of the book.

Linotype operators are not classical scholars—very seldom indeed, have more than a high school education, and a large number of the terms used in the book are technical and so have no intelligent significance to the operator. This being true, of course, he is delayed to such a degree as to make the volume of his work very much less than if he was setting up the average run of work.

In the opinion of this office the claim of Edwards & Broughton Printing Company for composition and one-half on the printing of this book is a just one and should be allowed by the State.

STATE PRINTING—COMPENSATION

June 25, 1925.

We have letter of June 24 from the Governor's office requesting that this office inquire into the claim of Edwards & Broughton Printing Company for increased compensation by reason of the fact that it used defective plates in printing 25,000 North Carolina public school registers for the State Department of Public Instruction. It appears from the testimony of Mr. W. H. Pittman, Director of Publication for that Department, that the plates were materially defective. The Bynum Printing Company, which printed the registers in 1922, complained that the plates were in very poor condition and on this account it had lost money in doing the work. In 1923 the Commissioner of Labor and Printing again awarded the job to the Bynum Printing Company, although its representative was exceedingly adverse to doing the work and using these old, defective plates again. When in 1924—about August 18 of that year—it became necessary to award this printing for that year, Mr. Hardison of Edwards & Broughton Printing Company was present in the office of the Commissioner of Labor and Printing at the time that Mr. Pittman took the order to that office. Mr. Hardison asked for the job. As Mr. Pittman recollects the circumstances occurring in the office of the Commissioner of Labor and Printing at that time, Mr. Hardison was informed that the plates used in printing the registers were in poor condition. Notwithstanding this information, he stated that he could turn out as good a job from these plates as the Bynum Printing Company had turned out the two preceding years. The job was awarded him as representing Edwards & Broughton Printing Company, the plates were turned over to him, and he did the work.

There are two points at which Mr. Hardison as representing the printing company showed his assent to the use of these plates. First, at the office of the Commissioner of Labor and Printing, as testified to by Mr. Pittman; and second, after he received the plates to do the job. There was no human power which could compel him to undertake this job with the plates in

the condition that they were in, and are now, probably. Yet, in each instance he testified his willingness to undertake the job with these plates. "*Volonti non fit injuria*" is a maxim of universal application in the law. It may be translated as "That to which a person assents is not esteemed in law an injury."

This, then, is the legal aspect of this particular claim. We think that the State is under no legal obligation to increase the compensation of the printing company for doing this work with plates so provided for it. Whether or not the State Printing Commission shall exercise its general discretion in the matter and provide some compensation for the loss incurred by the printing company in using the plates is a question which it would be improper for this office to determine, but it must be determined by that Commission itself.

STATE PRINTING—SUPREME COURT REPORTS

November 23, 1925.

I have your letter of November 21, sending letter of November 19 from Bynum Printing Company, and asking for my opinion as to whether the printing of the Supreme Court Reports is to be so included in the State printing contract as to be considered a part of the allotment to the printing company holding contract for the printing of these reports.

Under the provisions of C. S. 7296 and upon the facts submitted to me in regard to the manner in which contract for printing Supreme Court Reports and the actual printing of them is handled, I reach the conclusion that this printing is not so included and should not be charged against the company holding contract for the printing of these reports.

STATE PRINTING—ALLOCATION TO DEPARTMENTS

April 14, 1926.

I have your letter of April 9th, asking for construction of the various provisions of Chapter 134, Public Laws of 1925.

It is very difficult to construe this act. Consideration should be given to the general purpose indicated, and I also think it necessary to consider the duties usually to be performed by the administrative officers or bodies therein charged with the responsibility.

The Commissioner of Labor and Printing and the Budget Bureau make the allocation to the several departments of the appropriation for public printing. This should be done upon consultation with the heads of the departments. Care should be exercised to conserve the interest of the State and to give each department that proportion of the total appropriation which it will reasonably need to carry on its work.

I am of the opinion that each department has the right in the first instance to indicate the kind of paper, printing and supplies it desires. By reason of his general duties it would seem that the selection of paper and standard forms of printing would be left to the Commissioner of Labor and Printing. However, section 4 of the act apparently commits this to the Commissioner and the Budget Bureau jointly. These two departments should seek to agree on the subject. If there should be a disagreement, I would advise that the Commissioner of Labor and Printing would have a determinative voice in view of the fact that the subject is one usually and generally committed to his department.

The act contemplates that the Commissioner and the Budget Bureau shall operate together and in order to carry out the purpose thus indicated, they should make every effort to agree in these matters.

OPINIONS TO SALARY AND WAGE COMMISSION

HOURS OF LABOR

September 14, 1925.

I am of opinion that under Chapter 125 of the Public Laws of 1925, the Salary and Wage Commission is authorized to fix hours of labor for subordinates, clerks and employees, as well as to classify and to fix salaries for such subordinates, clerks and employees.

HOLIDAYS

October 22, 1925.

You ask my opinion as to whether the Salary and Wage Commission has authority to declare what days shall be observed as holidays by State employees.

The Commission was created by Chapter 125, Laws of 1925. By that act it was directed to investigate the cost and values of the wages and services rendered by subordinates and employees of State departments and agencies, and authorized to classify the same and fix the salaries and wages of each class or division.

A statute must be given such reasonable construction as will aid in carrying out the objects and purposes intended to be accomplished. It is practically impossible to frame legislation so as to provide in express language for every particular of administrative operation, or to control with positive direction every detail in its practical application. As a consequence, the statute is presumed to carry by implication all such provisions and to confer such rights and powers as may be reasonably necessary to carry into effect the intent and purpose of the Legislature in enacting it.

The act in question is very general in its terms. It can be seen that its purpose and intent is to confer upon the Commission the authority to classify employees and to fix their salaries and wages upon a basis fair and just to the State and the employee alike. Every power reasonably necessary to that end is implied from the general purpose and scope of the act. For that reason I advised you on September 14th that the Commission had the right to fix hours of labor. There is no statute fixing the hours of labor of State employees. The hours of labor to be performed necessarily enter into any judgment and decision as to the salaries to be paid. Clearly, then, the Commission has the right to fix the hours of daily labor in arriving at a decision as to the salaries to be paid.

A different situation arises with respect to holidays. The power to fix such holidays is not expressly conferred by the act. Does it arise by necessary implication? A necessary implication is not a possible one, nor yet a merely

desirable or beneficial one. It is one which is compelled from a reasonable view of the statute and is confined to strictly necessary incidents or logical consequences.

By C. S. 3959, twelve days are named and set apart as public holidays. The act does not directly repeal this statute or refer in any way to it. Repeals by implication are not favored. Their control is not within any necessary implication of the act creating the Salary and Wage Commission. The authority to limit the holidays to six or any less number than the twelve is not so incident to the authority to fix salaries upon a just and fair basis as to be necessarily implied from the authority conferred to classify employees and to fix a schedule of salaries and wages.

I, therefore, am of the opinion that the Salary and Wage Commission is not authorized to fix the holidays to be observed by State departments and employees at a less number than those set out in the statute, C. S. 3959.

SALARY OF EMPLOYEE

February 18, 1926.

I have your recent letter, asking for ruling on certain matters therein submitted covering operation of the Salary and Wage Commission.

(1) I am of opinion that the Commission is to determine whether a position to be filled by an employee warrants the pay allotted thereto. Therefore, in the illustration supposed in your letter, the increase of pay should not be allowed until approved by the Commission. In saying that, I wish to make it clear that the Commission has nothing to do with the selection of the employee. The selection of all employees still remains with the heads of the department, but an increase in pay or the compensation to be allowed to a new position must be approved by the Commission.

(2) I am of opinion that the resolution quoted is within the power of the Commission.

OPINIONS TO DEPARTMENT OF CONSERVATION AND DEVELOPMENT

FIRE PREVENTION—PROSECUTION

September 16, 1924.

We have received your letter of September 15th, and have noted its contents.

We know no reason why your district foresters and forest wardens have not the authority to allow parties to compromise on the basis of paying the actual cost of suppressing fire which has been started by the negligence of the party in question. The offenses charged against such parties in sections 4309, 4311 and 4312 of the Consolidated Statutes are misdemeanors, and there is no reason why a compromise should not be made in case of such offenses as there would be if they were felonies.

STATE GEOLOGIST—SALARY

February 6, 1925.

In your letter of today you ask for an opinion as to the right of the incumbent State Geologist to draw the salary appertaining to this office pending the appointment by Governor McLean under C. S. 6117 as amended by Chapter 214, Public Laws of 1923.

The statute on the subject is somewhat different from others which provide that the incumbent shall hold the office until his successor has been elected and qualified, in that it provides that "the term of office of the State Geologist shall expire with that of the Governor." However, I am of the opinion that under the general law on the subject of public officers, as well as this section, the State Geologist remains in office and is entitled to draw the salary thereof until his successor shall be appointed and shall qualify.

Our Court has held that this provision which appears in the Constitution as well as in most of the statute laws on the subject is in accord with the sound public policy which is against vacancies in public offices and favors the continuance of someone in the position to perform important official duties for the benefit of the public and of those necessarily having contacts with the office. In view of this public policy and of the provision in the statute that the State Geologist shall hold office until his successor shall be appointed and shall qualify. I advise that he is entitled to receive the salary while performing the duties of the office and pending the appointment of his successor by Governor McLean.

GREAT LAKES—FORT MACON

February 21, 1925.

In September, 1922, this office had occasion to investigate the State's relations to certain Great Lakes containing five hundred acres or more, and in consequence, wrote an opinion for Dr. E. C. Brooks, then Superintendent of Public Instruction, which opinion is found at page 106 of the biennial report for 1923-24.

It was in 1911 that the State took over these Great Lakes by act of the General Assembly. That act is now incorporated in the Consolidated Statutes as Section 7544, which is as follows:

Certain lakes not to be sold. White Lake, Black Lake, Wac-camaw Lake, and any other lake in Bladen, Columbus, or Cumberland counties, containing five hundred acres or more, shall never be sold nor conveyed to any person, firm, or corporation, but shall always be and remain the property of the State of North Carolina for the use and benefit of all the people of the State.

Under the law as it stands now, the control and protection of such Great Lakes seems not to be vested in any particular administrative board of the State. We suggest, therefore, that the Department of Conservation and Development be specifically authorized to look after and care for the interest of the State in these Great Lakes with a view to its protection.

We suggest also that the present General Assembly in some formal way accept the grant of the United States to the State of Fort Macon, as we understand the deed is written in such form as to make the land so granted a recreation area, thus imposing the burden upon the State to make it a recreation area.

BUDGET ACT—REVERSION OF FUNDS

June 16, 1925.

It seems from your letter of June 15th that the State appropriation for your Department for the fiscal year 1924-25 has been paid out of the State Treasury to your Department. All of this appropriation has been expended or will be expended before June 30th, the end of the present fiscal year. The Federal Government and the counties particularly interested have been and are now taking part in the protection of forests from fire by paying over to your Department a proportion of the funds used by your Department for this cause. This money derived from these two sources is now being paid to your Department. On June 30th, then, there will be a credit to your Department on the books of that Department of the funds thus derived. You do not state the amount that will be thus to your credit at that time.

Your inquiry upon this statement is whether or not the budget act requires this fund to revert to the general fund of the State, or whether it is available to your Department for the ensuing fiscal year, to be used for the purpose to which it has been devoted by the Federal Government and the counties interested. Section 19 of the budget act compels the reversion

only of unexpended balances of appropriations provided for in this section, and it is expressly declared that this reversion shall not apply to appropriations heretofore made by the General Assembly and paid out by the State Treasurer. The appropriation heretofore made by the General Assembly to your Department has been paid out to your Department by the State Treasurer and has been used by your Department in the conduct of its affairs, particularly with reference to forestry protection work. The act of Congress makes an appropriation for coöperation with the State in the protection of forests from fire. This appropriation is to be expended under the rules and regulations made by the Secretary of Agriculture. It contemplates coöperation with the State under a contract with the State for that purpose, where the State has a system of forest fire protection.

It is manifest that this appropriation thus distributed is for no other purpose than for protection from fire. If, then, you have a balance of this appropriation from the Federal Government available for use for the purpose to which it is devoted after the first day of July, 1925, it is not to be turned over to the State Treasury for the use of the general fund of the State. That would be entirely contrary to the purpose of Congress in making the appropriation. This same ruling, we think, would apply to appropriations made for this purpose by individual counties in this State. In no case is such appropriation a part of the general funds of the State of North Carolina.

FIRE PREVENTION—PROSECUTION

September 21, 1925.

We have considered carefully your letter of September 18th in relation to reimbursement for cost of suppression by those apparently responsible for the forest fire. You state it has been the custom of your department in dealing with people who offended against Sections 4311 and 4312 C. S. to suggest to them that if they pay the cost of extinguishing the fire caused by their neglect, that your department will not prosecute them under those sections.

Section 4311 makes setting fire to woodlands and grasslands through the negligent use of camp fires a misdemeanor punished by a fine of not less than \$10 nor more than \$50 or by imprisonment not exceeding thirty days.

Section 4312 requires persons who burn any tar kilns or pit of charcoal, or set fire to or burn any brush, grass or other material whereby any property may be endangered or destroyed to keep a careful, competent watchman in charge of such kiln, pit, brush or other material while burning. Any persons violating the provisions of this statute are punishable by a fine of not less than \$10.00 nor more than \$50.00 or imprisonment for not exceeding thirty days.

It is evident that the offense defined in these two sections are petty misdemeanors wholly within the jurisdiction of a magistrate. There can be no doubt, then, that if your department instead of prosecuting these individuals under these two sections, suggests to them if they pay the damage occasioned by the fire and the cost of putting it out, you will not prosecute, no criminal offense has been committed by your department.

There is a criminal offense called compounding a felony, but this is never extended to any crime less than a felony. Any settlement made by your department in this way, however, can in no way affect the right of action of particular parties who were damaged by the fire escaping in either the case defined in Section 4311 or that in 4312. It is, therefore, largely a question of the administration of the law by your department to accomplish the best results in suppressing the practices forbidden by these sections. Your department no doubt will require a strict accounting of sums of money thus received to pay the cost of extinguishing particular fires. It would be well to include in the settlement no guarantee of exemption from prosecution. That guarantee would probably be void as contrary to public policy.

LAKE WACCAMAW

September 29, 1925.

C. S. Section 7544 expressly declares that Lake Waccamaw (among others) shall always be and remain the property of the State of North Carolina for the use and benefit of all the people of the State. This section was Chapter 8 of the Public Laws of 1911. Its effect is to vest the title absolutely in the State of North Carolina as against all except private persons who have previous to that time obtained a grant from the State. There was no such grant according to our information. It would, therefore, make no difference if the General Assembly had previous to the act of 1911, put the control and management of Lake Waccamaw in the hands of the board of county commissioners of Columbus County. The act of 1911 would in practical effect repeal this former act and no one would be in a position to attack the constitutionality of this repeal. It is equally clear that Chapter 122, Section 9, Public Laws of 1925, places the control and administration of Lake Waccamaw within the authority of the Department of Conservation and Development.

In order, therefore, to preserve Lake Waccamaw for the purposes stated in the act of 1911, "for the use and benefit of all the people of the State," your Department has full and ample power. It seems from the documents sent with your letter that the county commissioners are anxious to turn over the lake and dam to your department for administration. All you have to do, therefore, would be to notify them that you are prepared to assume the duties imposed upon your Department by the act of 1925, and we suppose that the county will create no difficulty to your assuming this control.

Chapter 178, Public Laws of 1925, deals with Lake Waccamaw as the property of the State of North Carolina and appropriates \$3,000 of the State funds to erect a dam at the source of Waccamaw River to insure the maintenance and common water level at all times for the protection and preservation of the lake. This \$3,000 of the State was to be met by an equal amount raised by the citizens of Columbus County and the two funds were to be used in the erection of the dam. You state that this dam has already been constructed. You inquire whether or not under the provisions of this act the county, because of the money contributed by it, would have any hold upon the dam, and also whether the owners of the land at each end of the dam

can make any claim upon the State. We think not. The lake itself is an asset of the people of Columbus County, though the title thereto and its administration is vested in the State. This was a joint enterprise, therefore, for the benefit primarily of the citizens of Columbus County and secondarily of all the citizens of the State. The dam having been completed, the full title to and control of the same is in the State. We do not see how the erection of this dam could in any way impinge upon the rights of the land-owners near or at its ends. It is evident from your letter that conditions there have been complicated by a long, continuous drought, and if rains come, it is probable that all your difficulties in the administration of the lake may be removed.

We think the State could not vest in the county any right or control over the lake in such way as to prevent the General Assembly later from shifting this control to another department of the State Government.

DEPUTY FOREST WARDENS

December 11, 1925.

In reply to yours of December 8th. It appears from the enclosures in your letter that there are certain districts in the eastern part of the State where nearly all or practically all of the inhabitants are negroes. You ask the advice of this office, first upon the authority of the district forester to appoint a negro as deputy forest warden. There can be no doubt that he has this authority. But, second, can he restrict this deputy forest warden in his dealings with the inhabitants of the district to the negro population in such way that he would not have authority to summon a white man to assist him in putting out a fire or to arrest a white man for failure to obey the forest laws and statutes?

Following the strict letter of the law, we think this could not be done, but the advantages of having these colored deputy wardens are so great that if you can find a thoroughly reliable man who will obey instructions as to his dealings with white people, we think it would be better to appoint him. A delicate situation might be created unless the district forester is careful in his selection of such deputy forest wardens. It is not possible, however, to deal with questions arising from the race problem strictly from the standpoint of the law. It is obviously to the interest of the State and to proper preservation of the forests that in this negro settlement an honest, reliable negro should be actively interested in the prevention of the destruction of forests by fire, and there can be no doubt that such a man could accomplish much more in his community than an outside white man.

We return herewith the papers enclosed in your letter.

FIRE PROTECTION—COUNTY COMMISSIONERS

April 9, 1926.

In reply to yours of April 8th. Chapter 26, Public Laws of 1921 expressly authorizes coöperation between counties and State in forest fire protection.

That is brought forward in the third volume of the Consolidated Statutes as section 6140-a. That expressly authorizes county commissioners to appropriate money to aid in forest fire protection. All administrative bodies including the board of county commissioners have to obey this statute until the Court itself declares it unconstitutional, and this can only be done by the action of a taxpayer in the county in which the money is appropriated. For these reasons we think it inadvisable to investigate the question whether fire protection is itself a necessary expense within the meaning of the Constitution.

APPROPRIATION—SESQUICENTENNIAL EXPOSITION

July 16, 1926.

You state that conditions arising out of the North Carolina representation at the Sesquicentennial Exposition in Philadelphia has given rise to an emergency in that the appropriations for the various departments which are to participate in the exhibition of the resources, etc., of North Carolina are inadequate to pay the cost of such participation by the State in the exposition. We regard North Carolina's participation in this exposition as unquestionably vital to the best interests of the State. At the time the General Assembly of 1925 was in session the claims of this exposition were not presented to it in such way as to induce it to see the prime necessity of North Carolina's participation. It did, however, in the appropriation bill, Chapter 275 Public Laws of 1925, make a contingency and emergency appropriation of \$250,000 for each of the fiscal years in the current biennium. Among other objects for which the appropriation was made was this:

Other extraordinary expenditures which cannot be forecasted.

We regard this as making this fund available for all purposes connected with making an adequate exhibition in Philadelphia of the resources, etc. of the State of North Carolina. You suggest that the total amount necessary to be used from this appropriation is \$8,500. We think that this appropriation is not only available for this purpose but under the conditions which now exist it should be resorted to in order to provide this fund necessary adequately to represent North Carolina at the exposition.

The Attorney General in private conference heartily approves this view.

OPINIONS TO CASWELL TRAINING SCHOOL

MOTOR VEHICLES—PUBLIC OWNED—ACT OF 1925

March 18, 1925.

I have your letters of March 13th and 14th with reference to the act to prohibit the use of public owned automobiles for private purposes. I herewith send you a copy of this act. You will observe that it became operative upon its ratification, March 10th.

The act is very definite in its terms and in most cases should require very little from this office for its construction or interpretation. You will observe that it prohibits the use for any private purpose of any motor vehicle belonging to the State, any county, or any institution or agency of the State. If the State supplies you with an automobile, you may use it when engaged in the State's business and only when so engaged. You would have no right to use it for any private purpose. I think that the act prohibits your use of the car in taking your family to church, as suggested in your letter. Taking your family to church can only be held to be a private and not a public purpose. For that reason I advise that you should not so use a car owned by your institution.

You state that you operate a State-owned bus that carries your employees to town and back, and the children of the employees to and from school each day. If some of your employees live at a distance from the institution and you have made a contract with them under the terms of which your institution is to transport them to and from their homes so as to perform their duties or work at the institution, I think that this would not be a use of the car for a private purpose. Necessarily, such employees must in some way move back and forth from the institution. If you have employed them so that this transportation forms a part of their compensation, such transportation would be permissible.

Under the act you would not be permitted to use the vehicle in transporting them to and from church nor do I think that it could be used in conveying their children to and from school. I think that under the act this would be a private purpose and condemned by its provisions.

It may be that section 2 may have some application to your situation and I, therefore, give you my views on that also. It appears that some officers, agents and employees of State institutions and agencies own their cars under an arrangement by which the up-keep of the car, including tires, oils, gasoline and other accessories, is taken care of by the particular institution. Section 2 would prohibit such an arrangement.

I understand that certain agents and employees of the State Department of Revenue, and probably of other State agencies, furnish their own cars and that they receive a reasonable allowance per mile for the use of the cars while used on official business. Such an arrangement is permissible under the act in question.

There may be circumstances other than those mentioned in your letter under which you may be in doubt as to the prohibitions of this act. It should at all times be construed by those affected so as to carry out its purpose and intent and to correct the conditions at which it is manifestly aimed. We will be glad to advise you further upon any circumstances which may arise, but I am suggesting now that all officers, agents and employees of the State should be careful not to offend against its provisions and in cases of doubt, get the opinion of this Department before acting.

SOLVENT PARENTS—COST OF INMATE

April 28, 1925.

I have your letter of April 25th, asking for my views as to what your Institution should do in view of the provision in section 4 of House Bill 836, Senate Bill 918, to the effect that a parent should have the option to pay the actual cost as determined by the Institution or remove the patient therefrom.

I do not agree that an inmate would have no legal parent or guardian because of the provisions contained in your application whereby such parent waives the right to remove the child without having received written permission from the institutional authorities. Notwithstanding that provision in your application, the parent, guardian, trustee, or other person legally responsible would be liable for the cost so determined to the extent prescribed in the act.

It is further my view that you would not be justified in sending patients or inmates away on account of the failure to pay such cost immediately. The act contemplates that the authorities shall determine the reasonable cost per inmate and that thereupon payment shall be made in such manner and at such intervals as may best be agreed upon between the authorities and the parent or guardian. If it is determined that some person is responsible for this cost and has means with which payment may be made, upon a refusal to make such payment suit should be brought as contemplated by the other sections of the act.

I find myself in some doubt as to the right of the General Assembly to require removal of inmates and patients at these institutions simply because a person legally responsible therefor refuses to pay the ascertained cost. Through the whole of article 11 of the Constitution there runs the idea that the State shall to some extent care for defectives such as those committed to your institution. By section 11 of the article it is provided that

It shall be steadily kept in view by the Legislature and board of public charities that all penal and charitable institutions should be made as nearly self supporting as is consistent with the purposes of their creation.

The whole purpose of the recent act on this subject is to carry out the idea thus expressed in section 11, but my view is that the obligation on the part of the State to care for these defectives still remains. I doubt if the

Courts would permit the practical expulsion of such patients and inmates from this institution simply upon the finding on the part of your board that some person legally responsible was financially able to pay for the ascertained cost. I do not, therefore, advise that you take this course.

I assume that some consistent policy will be adopted along these lines. My present view is that these patients and inmates should not be sent away from the institution simply upon a determination thus made by the board and regardless of whether they are in such condition as will justify sending them back to their homes. I also have the view that the main purpose of the act is to collect from those legally responsible the ascertained cost and that this may be done by a suit in Court when it cannot otherwise be arranged with such parties.

STATE INSTITUTIONS—POWER LINE CONTRACT

June 14, 1926.

We have examined the papers sent us by you at the request of Mr. L. P. Tapp.

(1) Agreement for placing pipe line underneath the track of the Norfolk Southern Railroad Company. This agreement is in the usual form but it contains a provision (article 9) that largely nullifies its usefulness so far as the Institution is concerned. Article 9 is as follows:

It being mutually understood and agreed by and between the parties hereto that this agreement shall continue in force and effect until terminated by either of the parties hereto giving to the other party thirty days' notice in writing of its intention so to do.

As this pipe line is to be constructed under the track of the Norfolk Southern Railroad Company, it must be taken to have been located at a point necessary to supply the Caswell Training School with a sewer line that in order to be useful, must be in its nature permanent. The expense of running it under the railroad and then leaving it optional to the railroad company to require the school to remove it upon thirty days' notice is putting, it seems to us, the school wholly in the power of the railroad company. We suggest, therefore, that you request the railroad to permit this provision to be eliminated from the contract. The other provisions very properly secure the safety of the railroad while the work is being done and after it is completed. The Institution, of course, ought not to ask that this particular work should be done without securing this safety.

(2) In the matter of the power line above the track. At the outstart, we call your attention to the fact that the contract itself makes the school an insurer of the safety not only of the railroad but of all its employees and of all others who may be injured by the power line, regardless of whether the school, its servants or agents, have been negligent or not. The nature of the erection is such that it is necessary probably that this should be done in ordinary cases. The consequences, however, to the school are so great that you will pardon us for suggesting that if it is practicable, it would be better

to run this line underneath the railroad's right-of-way. We, of course, cannot say that this is practicable from the standpoint of an engineer. It is quite possible, however, that if the contract should be held valid as against the State of North Carolina, a very large sum of money might be demanded by persons injured from some catastrophe not foreseen, such as a severe storm which would blow the power line down in such way as to cause a wreck of a passenger train. All these considerations no doubt have been entered into by your board. As a legal proposition, however, we think that the drastic provisions of this contract, so far as the State of North Carolina is concerned, are null and void. We think no institution of the State can commit the State itself to the possibilities which may arise from a so-called breach of this contract.

We write this for your own consideration and not as criticising the form of contract, which is entirely appropriate if entered into by the railroad and a private industry.

CERTIFICATE OF SUPERINTENDENT

June 21, 1926.

I have your letter of June 17th in regard to Eddie Starr, an inmate of your Institution. I assume from the letter of Mr. Byerly that he is now of age.

With respect to inmates of hospitals for the insane, there is a presumption of incompetency upon which the superintendent may give a certificate to that effect and a guardian may be appointed without the hearing usually necessary. C. S. 2286. This does not apply to your Institution.

I assume that most if not all of your inmates are incompetent. If this boy is of that type, a guardian should be appointed for him as provided by C. S. 2150, 2156, and III C. S. 2285. An action of this kind is within the hands of the clerk of the superior court. The boy's settlement is apparently Davidson County and the guardian should be appointed there if his condition is such as to require such appointment.

The guardian appointed should take such action as to the fund as he may be advised. It is not my duty to advise him, and certainly would not undertake to do so without full knowledge of all the circumstances. Any attorney of Davidson County would, no doubt, advise him properly on the subject.

The Institution would certainly be entitled to the income from his estate, assuming that he has no family, which I take to be the case.

OPINIONS TO STATE SANATORIUM

INDIGENT PATIENTS—COUNTIES

April 9, 1925.

In the matter of indigent patients

Prior to August 23, 1924, indigent patients were admitted to the Sanatorium under powers exercised by the board of directors under C. S. Section 7173. The portion of such section material to this discussion is as follows:

The directors shall determine the qualifications for admission of those applying as patients to the institution. They shall make all such by-laws and regulations for the government of the institution as shall be necessary, among which shall be such as shall make the institution as nearly self-supporting as shall be consistent with the purpose of its creation, and the directors shall do such other things as seem reasonably necessary and incident to the proper management and maintenance of the institution.

During that period indigent patients were received in the institution and their expenses, or part, at least, of the expenses, were paid by charitable organizations such as Red Cross, etc., and by cities, towns or counties under C. S. Section 7179. The board, so many were the applications made to it, maintained a waiting list in which the applicants took their turn if they were otherwise proper subjects for treatment in the Sanatorium.

At the extra session of the General Assembly in 1924 there was enacted a law, ratified August 23, 1924, Chapter 86, Public Laws, Extra Session, 1924, which prohibited the board from making any by-law or regulation which shall exclude any patient, otherwise properly qualified for admission, on account of inability to pay for examination and treatment, or either, at said institution. It further declares that all indigent patients who are otherwise proper patients for admission in said institution, when there is space and accommodation for such patients, shall be received without regard to their indigent condition. This, it is apparent, compels the board to put such indigent patients upon its waiting list. As indigent patients as defined in the act are very numerous, it seems that in the course of time this class, taking its turn on the waiting list and being admitted regardless of its indigent condition, would crowd out the other class who are able to pay, thus largely increasing the burden upon the State to care for its tubercular citizens.

This was the reason why the General Assembly at its regular session in 1925 amended Chapter 86, Public Laws, Extra Session of 1924, by adding at the end of section 1 of this chapter the following:

Provided that nothing in this act shall be interpreted to conflict with or interfere with the provisions contained in section 7179 of the Consolidated Statutes.

Section 7179 of the Consolidated Statutes is in these words:

Indigent tuberculous to be treated at State Sanatorium. Any city or town in the State of North Carolina, through its board of aldermen, town council, or other governing body, and any county in the State, through its board of commissioners, is hereby authorized and empowered to provide for the treatment of any tubercular person or persons resident in and who is a bona fide citizen of said city, town, or county, at the North Carolina Sanatorium for the Treatment of Tuberculosis, and pay therefor to the North Carolina Sanatorium for the treatment of tuberculosis an amount which shall not be more than one dollar per day per patient.

It seems clear that the intent of the Legislature in adopting the amendment of 1925 was to provide some means of relief for the Sanatorium arising from the fact that, under the act of the extra session not thus limited, it might be crowded with indigent patients to the exclusion of those who could pay. As quoted above, Section 7173 requires the board to maintain the institution as nearly self-supporting as shall be consistent with the purpose of its creation. This is in accordance with Section 11 of Article 11 of the Constitution:

It shall be steadily kept in view by the Legislature and the board of public charities that all penal and charitable institutions should be made as nearly self-supporting as is consistent with the purposes of their creation.

You ask the opinion of this office (1) as to whether or not C. S. Section 7179 quoted above is mandatory in its provisions; (2) whether or not, if it is not so mandatory, the board can make it mandatory under its authority to make such rules and regulations as will make the institution as nearly self-supporting as shall be consistent with the purpose of its creation, particularly in the light of the amendment of 1925.

(1) The terms used in Section 7179 are "authorized and empowered." Quite frequently these words in statutes are construed as permissive only, but as frequently they are construed as mandatory when the circumstances surrounding the passage of the act and the object had in view are considered. Black in his *Interpretation of Laws*, second edition, page 540, thus states the rule applicable to the discussion in the instant case:

Where a statute provides for the doing of some act which is required by justice or public duty, or where it invests a public body, municipality or officer with power and authority to take some action which concerns public interest or the rights of individuals, though the language of the statute be merely permissive in form, yet it will be construed as mandatory, and the execution of the power may be insisted upon as a duty.

He states that this rule is applicable to all sorts of public officers, boards and commissions. Our own Court in *Jones v. Commissioners*, 137 N. C., 579, holds that the terms "authorized and empowered" are to be construed as mandatory when the circumstances surrounding the enactment of the statute

require that in order that the purpose of the Legislature should be carried out, they should be construed as mandatory. In that case the Court held that these terms in relation to a bond issue by the county were mandatory under conditions surrounding such bond issue.

In the instant case the General Assembly of 1925 recognized the fact that the conditions arising out of the enforcement of the act of the extra session of 1924 were such as to require partial relief, at any rate, for the Sanatorium. It, therefore, declared that nothing in the act of the extra session should conflict with or interfere with Section 7179. If that section were to be construed as permissive only, this act of 1925 would be wholly futile and could accomplish no good result in relieving the Sanatorium of the burden of indigent patients. We, therefore, think that under these circumstances the words "authorized and empowered" as contained in Section 7179 quoted above are to be construed as mandatory upon the city, town, or county in the State and they are, therefore, required to pay to the North Carolina Sanatorium an amount which shall not be more than one dollar a day for each indigent patient who had a settlement within its territorial limits.

(2) As a consequence of this ruling and as largely a corollary thereof, we think that the board can make a rule or regulation applicable to these cities, towns, or counties which shall require them to pay one dollar a day to aid in the support and treatment of indigent patients admitted to the Sanatorium from within their territorial limits.

ACT OF 1925—SUPPORT

April 14, 1925.

We think you could put to the proposed patient in your Sanatorium questions similar to those numbered 34, 35, 36, 37, 38, 39, 40 and 41 on page 502 of the Third Volume of the Consolidated Statutes. In addition to the answers you receive to those or similar questions, you might very well get a certificate from the clerk of the superior court of the county from which the patient comes, of a form somewhat similar, at any rate, to that on page 501 of the Consolidated Statutes.

We think it would be well for your board to make rules and regulations in regard to the necessary amount of income or property ownership which would be used as a basis as to the admission of patients who have some property. A single man with some property occupies a very different position from a married man with a wife and children with the same amount of property. It would be just to compel the former to pay at least a portion of the cost of his treatment, while it would not be just to compel the latter to pay any part of the cost of such treatment. Each particular case within well defined limits should stand on its own bottom in this regard.

MISCELLANEOUS OPINIONS

POISONS—PAREGORIC, ETC.

September 18, 1924.

Re Pro: N:L—ALT—1538

Prior to the enactment of the act of the special session, House Bill 23, Senate Bill 203, ratified August 23, 1924, and in effect from and after its ratification, this office has ruled that the State Board of Pharmacy under the statutes of North Carolina as they then existed had no authority to class as poisons such preparations as paregoric, Godfrey's Cordial, etc., which contained in small proportions narcotic drugs. Our reasons for so holding is to be found in the following suggestions:

C. S. Section 6667 expressly exempts from its provisions the selling at retail of non-poisonous domestic remedies. This designation is of course, general in its nature, but the terms "domestic remedies" had at the time of the enactment of the law in 1905, and have now, a definite signification. When the statute comes to deal with narcotics and certain other drugs, in Section 6672, it expressly in sub-section 4 thereof declares that the above provisions shall not apply to preparations containing opium or its derivatives and recommended and sold in good faith for diarrhea, cholera or coughs, each bottle or package of which is accompanied by a specific direction for use and a caution against habitual use, nor to the compound powders of ipecac and opium commonly known as Dover's Powders. The latter provision became the law in North Carolina in 1919 and it tends to make the exception from the act of 1905 more definite and being so made more definite, it would include such preparations as paregoric, Godfrey's Cordial, etc.

The General Assembly, however, at its extra session in August, 1924, acting on the assumption that the instructions of the State Board of Pharmacy were based upon statutory authority and not *brutem fulmen*, enacted the statute above referred to. The reason for the enactment of the latter law was this: That in quite a number of counties of the State the drug stores are very few and located only at the county towns. Country stores were in the habit of dealing in paregoric and Godfrey's Cordial, etc., for the benefit of the community in which they lived. Such preparations, though of course, liable to abuse in their use, were certainly non-poisonous domestic remedies and could be very well sold in good faith for diarrhea, cholera or coughs. The Legislature intended, then, to remove any doubt as to the authority of country stores to deal in such products for the benefit of their communities.

Section 2 of this act exempts twenty-six counties in the State from its operation. If the act had stopped there, there could be no doubt that its effect under the rules of construction applied to such statutes would be to require such remedies to be sold in the counties exempted from the operation of the act only by registered pharmacists. Section 3 thereof, however, declares:

That in the counties exempted from this act, the law as to the sale of drugs as heretofore existing on August first, one thousand nine hundred and twenty-four shall be and remain the law therein.

If, then, the construction of the law as it existed on August 1, 1924, by this office was correct, it seems that the act of the extra session has not modified the rule adopted by us.

Taking up, then, your questions seriatim, we append the answer to each:

(1) Under the present State law of North Carolina, (the act of August, 1924, being now in force) may a general merchant located anywhere in the State of North Carolina, who has no registered pharmacist in his employ, sell exempt preparations, such as paregoric, Godfrey's Cordial, etc. as a medicine?

In the opinion of this office the answer to this question should be "Yes" with the following qualification: Section 1 of the act of 1924 has appended to it this proviso:

Provided, this act shall not apply to any city or town wherein there is located an established drug store.

No general merchant, then, in any of the counties to which the act of 1924 is applicable, who does business in a city or town wherein there is located an established drug store, can sell these remedies, but persons desiring them must resort to the drug store.

(2) Under the present State law, as outlined in Question 1, may a general merchant, who has no registered pharmacist in his employ, and who is located in one of the twenty-six counties enumerated in Section 2 of the act identified as HB-23-SB-203, sell the so-called exempt preparations such as paregoric, Godfrey's Cordial, etc., as a medicine?

In the opinion of this office, the answer to this question should be "Yes."

(3) Under the present State law in North Carolina as indicated in Question 1, may a general merchant who is located in any city or town wherein there is an established drug store, which city or town is not within one of the twenty-six counties mentioned in Section 2 of the State law identified as HB-23-SB-203, sell the so-called exempt preparations such as paregoric, Godfrey's Cordial, etc., when such general merchant has no registered pharmacist in his employ?

The answer to this question, in the opinion of this office should be "No."

MEDICAL EXAMINERS—LICENSE—DANGEROUS INSANE

December 12, 1924.

You state that you recently received a request from Dr. J. W. Peacock, now in California, for an official certificate of his having been licensed to practice medicine in North Carolina, to be used in his application to the California Board of Medicinal Examiners in connection with his securing a license in that State.

Your Board under C. S. Section 6618 has authority to rescind license granted by it to a physician upon satisfactory proof that the physician has

been guilty of grossly immoral conduct. We suppose, of course, that your Board has not acted under this authority, so the matter stands thus: Dr. Peacock has been tried under a charge of murder in the first degree and has been acquitted on the ground of insanity. The California court seems to have held that he is now sane; if not, it is quite probable that the executive authorities of that State would insist upon his being returned to North Carolina as an insane man having his settlement in this State. What you shall do in the matter is not defined in any law of which we are aware, nor have we been able to find anything in the statute which requires you to certify the fact that Dr. Peacock was a licensed physician. We, therefore, infer that the issuing of this certificate is regulated by some rule or regulation of your Board. If this is true, we know no reason why you should not certify the fact of his license, and at the same time, certify to the California Board of Medical Examiners the additional facts which arose out of his trial for murder in the first degree, and let them act upon Dr. Peacock's application as seems best to them.

MOTOR VEHICLES—COUNTY LICENSE TAX

January 21, 1925.

You ask the opinion of this Department on the following question:

Is it against the Constitution or the statutes of North Carolina for the commissioners of Anson County to levy an additional tax on gasoline and motor vehicles for the maintenance of the public roads of said county?

Section 29 of the State Highway law is as follows:

The foregoing fees shall be paid to the Secretary of State at the time of issuance of said registration certificates, permits, or licenses. They shall include all costs of registration, issuance of permits, licenses, and certificates, and the furnishing of registration plates, and shall be in lieu of all other State or local taxes (except ad valorem), registration, or license fees, privilege taxes or other charges: *Provided, however*, a county, city or town may charge a license or registration fee on motor vehicles in the sum of one dollar (\$1) per annum: *Provided further*, that no county, city or town shall charge or collect an additional fee for the privilege of operating a motor vehicle, either as chauffeur's or driver's license: *Provided*, nothing herein shall prevent the governing authorities of any city from regulating, licensing, controlling of chauffeurs and drivers of any such car or vehicle, and charging a reasonable fee: *Provided further*, that any city or town may charge a license not to exceed fifty dollars (\$50) for any motor vehicle used in transporting persons or property for hire in lieu of all other charges, fees, and licenses now charged.

You will thus see that this permits a county to levy a license tax on motor vehicles not exceeding \$1 per annum.

I find no statutory authority for the levy by the county authorities of any privilege or license tax upon the sale of gasoline.

The Constitution permits the Legislature to tax trades and professions and to levy privilege and license taxes upon them. It is, therefore, largely a matter of public policy for determination by the General Assembly as to how far it will permit the several boards of county commissioners to levy privilege and license taxes upon the operation of automobiles or the sale of gasoline.

BOARD OF ELECTIONS—COUNTY—BALLOTS

February 25, 1925.

My attention has just been called to letter of Hon. W. C. Hammer to you under date of February 20th which was left here by you for an opinion from me. I gather that you want to know if Mr. Hammer is correct in saying that the tickets for county officers will not be prepared and printed by the county board of elections in case Randolph County should be excluded from the primary law.

Mr. Hammer is correct. Under C. S. 6050 it is made the duty of the county board of elections to prepare and distribute ballots for legislative and county officers, and under C. S. 6051 it is provided that no name other than the name of the persons chosen in the primary shall be printed as a candidate of any political party. Under this latter provision it is my opinion that unless the candidates are selected in the primary, the county board of elections will have no authority to prescribe the size of ballots and prepare and have them printed.

STATUTES—COUNTY COURT

February 26, 1925.

You ask if you may pass a bill establishing a recorder's court for your county or town. Article 2, Section 29 of the State Constitution provides that the Legislature may not pass any "local, private or special act . . . relating to the establishment of courts inferior to the superior court." It is generally recognized that since this amendment to the Constitution went into effect on January 10, 1917, these courts can only be established by general acts. As a consequence, the Legislature passed a bill on this subject, which is in the chapter on courts in the Consolidated Statutes. I advise that if your bill provides for the establishment of a special court of this kind, in my opinion it would be unconstitutional.

STATUTE—CONSTITUTIONALITY

March 5, 1925.

I have your letter of March 3d in regard to Chapter 120, Public Laws, Extra Session, 1924. It is my opinion that the act is constitutional.

You, of course, are acquainted with the line of decisions holding that the constitutional school term must be maintained and sufficient funds provided for that purpose, regardless of the constitutional limitation on taxation. The Court so held before the amendment, which is now a part of Constitution, Article 5, Section 6, which provides that the limitation therein does not apply to taxes levied for the maintenance of the public schools for the six months' term.

The leading cases on this subject are *Lacy v. Bank*, 183 N. C., 373, and *Lovelace v. Pratt*, 187 N. C., 686. Buildings are as necessary for the six months' term as teachers' salaries. The erection of school buildings is not a duty resting primarily upon the particular district. That duty under the Constitution rests upon the State and the county. To meet that duty, the State and counties may issue bonds and levy sufficient taxes for such purpose.

I think that the meaning of the *Lacy* case is that maintenance of the six months' school term includes reasonable equipment for that purpose, such as necessary school buildings. If a particular district wants to go beyond the usual and necessary for this purpose, the Court seems to imply that it could do so only by vote of the people providing a bond issue and special tax for that purpose.

I find no provision under which the local districts may reimburse the counties for funds necessarily expended in erecting school buildings except where loans are made from "the special building fund." Fact is, I think that it is contemplated by the Constitution, the apposite statutes and the decisions of the Court on the subject, that a county shall provide the necessary school buildings for the conduct of the six months' school term.

Under the act referred to, the county board of commissioners have authority by the method therein specified to issue bonds for the erection of school buildings. The right, the duty, and authority of the county to provide buildings for the constitutional school term is not limited to any particular district. I can see no reason why a board of education and a board of county commissioners should provide the necessary buildings for the constitutional school term in a non-local tax district and not do so in a special tax district and that, whether such district is special charter or not.

Of course, you must realize that the act referred to has not been construed by our Supreme Court. That Court may take a different view from that herein presented, but basing my opinion upon the decisions heretofore rendered by it, I think it would hold along the lines herein indicated.

TAXATION—OMITTED PROPERTY

March 21, 1925.

Your letter of March 20th came to the office in the absence of the Attorney General and I am undertaking to reply to the same.

Section 74 of the Machinery Act of 1923 (which has been brought forward as Section 72 of the Machinery Act of 1925) is not in all particulars

clear. Its interpretation, then, necessarily involves some doubt. The first clause in said section is to the following effect:

In all cases where the board of commissioners shall have omitted, or in any future year shall omit, to enter upon the duplicate of their county any land or town lots situated within their county subject to taxation, it shall be their duty, when they enter the same to duplicate the next succeeding year, to add to the taxes of the current year the simple taxes of each and every preceding year in which such land or town lots shall have so escaped taxation, with twenty-five per centum in addition thereto, so far back as the said lands have escaped taxation.

You will observe that this is dealing with an omission on the part of the board of commissioners. There must have been an assessment of the land during the period but the land itself was not entered upon the duplicate on account of the omission of the county commissioners or the list-taker to enter said tract of land upon the tax list. Where these facts concur, then there is no statute which prohibits the county commissioners from going back an unlimited number of years and placing the lands so omitted upon the tax list and collecting the taxes.

The other class of property which has escaped taxation is thus described:

When no assessment (i.e. of the particular property) has been made for the years in which said property has so escaped taxation, the board of commissioners shall be authorized to value and assess the same for those years.

Of course, with the power to value and assess is included the power to collect the taxes for the period in which the land has escaped taxation. But the statute limits that period to five years. This constitutes in effect a limitation upon the power of the commissioners to assess lands for taxation beyond the five year period. It is very clear that the General Assembly could permit the board of commissioners to go back for an indefinite period to collect the taxes upon lands which had been omitted from the tax list after an assessment of their value had been made. *Wilmington v. Cronly*, 122 N. C., 383. It is stated in that case that the provision limiting the power of the commissioners to assess unassessed property to five years was first added to the Machinery Act in 1897, but that case holds distinctly that there is no limit to the first class of property omitted from the tax list. This is the only instance so far as I know, where such right of the State is not limited. See *Threadgill v. Town of Wadesboro*, 170 N. C., 641, at 643.

The difficulty this office is having in construing the official automobile act arises from the proviso attached to section 3, where it is declared "That nothing in this act shall be construed to authorize the purchase or maintenance of an automobile at the expense of the State by any State officer unless he is now authorized *by statute* to do so." The first part of section 3 deals with the question as if there was existing authority in some of the institutions or agencies of the State to purchase automobiles and trucks, and limits the amount of purchase price in the first instance to \$1,500. Now, if the Legislature had used the expression "authorized by law" instead of

"authorized by statute," the difficulty would have been obviated because in quite a number of cases of institutions and agencies of the State the power to purchase such vehicles may be found in the nature of the business carried on and the necessity for doing so by an administrative body which has committed to its care the conduct of a business which requires this purchase. But when they put the words "by statute" in the act, we have to look for a specific statute which authorizes the purchase of motor vehicles, and there is none in any statute which permits this with the exception of the Governor of the State.

STATE INSTITUTIONS—CONTRACT

March 24, 1925.

(1) You state that your board of trustees early in 1923 entered into certain contracts for the erection of a number of buildings for the school. Among such contracts was one for the erection of a power house and laundry building, including a large amount of expensive tunneling, installation of complete boiler units, etc. Your appropriation was not large enough to meet these contracts. Whereupon there were certain addenda added to the contract which provided for the omission of some of this expensive work. You do not inform us whether or not the contractor signed these modifications of the contract and consented to them. If he did not, and his original contract was valid, then you had no authority to change it in any particular without his consent where such change modifies his rights and the fact that your existing board may be succeeded by another board constituted of a different personnel would not affect the rights of the contractor.

This answers your second question.

(3) We think that if the Legislature appropriates a certain amount for permanent improvements, designating the purpose of the appropriation, and it is found to cost less than the amount appropriated, the board of trustees cannot use the remaining part of such appropriation for any other purpose without specific authority from the Legislature.

STATUTES—REPEAL

April 2, 1925.

The recent General Assembly enacted a law which was intended as a substitute for the previous law creating a board of public accountancy, and to that end repealed in absolute terms, in section 19 of the act, this previous law. The effect of this repeal, standing alone, would be to abolish the State Board of Accountancy as organized under the Act of 1913 under which it was created. It was, however, in section 11 of the recent act declared that no appointments to the Board of Accountancy created by it should be made until the expiration of the terms of the members of the present Board. The necessary effect of this was to continue in office the Board existing at the time of the enactment of the recent law, who should exercise

all the powers and functions conferred upon the Board of Accountancy created by that act until the terms of office of the members of the existing Board should expire. Consequently the existing Board functions under the act of 1925 in all particulars until the terms of office of the members expire and new appointments are made.

SALARY AND WAGE COMMISSION—SUPREME COURT EMPLOYEES

April 22, 1925.

The question has been presented to this office as to whether or not the subordinate officers, clerks and employees of the Supreme Court come within the provisions of the act to provide a salary and wage commission. After close consideration of the act, which was ratified on the 4th of March, 1925, we have come to the conclusion that they are not within such statute. Section 2 of the act describes the class of subordinate officers, clerks and employees which are within the act as those of the Executive and Administrative Departments and other agencies of this State. This designation is carried carefully through the remainder of the sections of the act. For instance, in section 3 it speaks of subordinates and employees of "these departments and agencies." Again, in section 4 it uses the same terms. Again in section 5 it uses equivalent terms. Again in section 7 it uses the same terms. Again in section 9, the same terms.

The Constitution of North Carolina in dealing in broad lines with the Departments of the State Government, classifies them as Legislative, Executive and Judicial. The statutes of the State so far as we have been able to ascertain maintain these same grand divisions when dealing specifically with them. The Executive Department of the State Government is again subdivided into administrative departments, charitable institutions and educational institutions, etc. If the General Assembly in this act had intended it to apply to the Judicial Department, it no doubt would have used adequate and sufficient terms to make it so apply. It would be very easy to put in the act, in connection with Executive and Administrative Departments, the Judicial Department, but the General Assembly did not do so and we think this omission was intentional and advised.

HOME EXEMPTION ACT

May 2, 1925.

You ask this office to interpret the recent amendment to our Constitution in regard to the taxation of homes, homesteads, notes and mortgages, and to indicate such procedure as the tax authorities should follow in view of this constitutional change. In the first place, let me say that exemptions from taxation are not favored, and that the amendment and the act putting it into effect should be strictly construed. There are certain requisites which must be complied with before the exemption can be permitted.

(a) The notes and mortgages must have been given in good faith to build repair or purchase a home. It follows that where the note and mortgage are given as an ordinary borrowing transaction and the proceeds of such loan are not actually used to build, repair or purchase a home that no exemption is allowable.

(b) The exemption is limited to a loan which does not exceed \$8,000 and which runs for not less than one nor more than thirty-three years.

(c) The holder of the note and mortgage must live in the county where the land lies and must list and pay taxes on it in that particular county. The principal difficulty arises in applying this provision. It is apparent that the exemption is allowable where an individual uses and occupies the land as a home as defined in the amendment and the mortgage is held by another individual resident of the same county. But it is troublesome to determine the effect of the language used when the mortgage is held by a corporation. Generally speaking, the residence of a corporation is its principal place of business. It follows that the exemption is not allowable when the mortgage is held by a foreign corporation, although domesticated in this State, since it does not "reside" here.

The effort will probably be made to obtain the exemption on account of mortgages given to building and loan associations. It is my opinion that the exemption may be claimed by the home owner if the mortgage is listed by the local building and loan association and taxes paid on the note and mortgage at the local rates. I advise, however, that the listing and payment of taxes on such notes by a local association would not operate to lessen the taxes that such association must pay under section 62, Revenue Act, and section 38, Machinery Act. These associations are given very favorable consideration by these provisions of our statutes and in view of the method there adopted for their taxation, I am of the opinion that the listing of specific notes and mortgages held by such associations under this constitutional amendment could not operate to lessen the taxes such associations pay under those provisions of the law.

It may be sought to obtain benefits of the exemption on notes and mortgages given to other corporations. Under no circumstance could the right to the exemption arise in any case where the land lies in a county other than that of the principal office of such corporation. Of what effect the listing of the note and mortgage given to such other corporations and the claim for exemption on account thereof may have upon the returns to be made by such corporations on property for taxation, I do not now undertake definitely to determine.

(d) The exemption only applies where the mortgage is against a "home" definitely defined in the amendment and established as such by actual use and occupancy of the premises as a dwelling place of the purchaser or owner for a period of three months preceding the time for listing.

(e) When the requirements have been met, the home is exempted from taxation for fifty per cent of the value of the note and mortgage, and the note and mortgage are so exempted for fifty per cent of their value.

The amendment becomes operative this year for the first time. We do not have the benefit of any authoritative construction of it by our Supreme Court. The taxing authorities should endeavor to apply it fairly for the

benefit of the citizen and yet strictly in accordance with its terms, so that no property shall escape taxation unless clearly within its meaning.

I apprehend that the taxing authorities will make mistakes in trying to apply this law for the first time. In order that as few mistakes as possible may be made, the tax lister should obtain all necessary information from the taxpayer. He should ascertain the residence of mortgagor and mortgagee, the amount, and all particulars with respect to the obligation, and should see to it that no reduction in the valuation of a particular home is allowed unless the note or mortgage upon which the exemption is claimed is listed for taxation.

The amendment is contained in Chapter 115, Public Laws, Extra Session of 1924. I suggest that list-takers be supplied with copies of the amendment. The constitutional provision is self-executing, but the last Legislature passed an act for the purpose of putting it into effect, and that act is in almost identical language of the amendment.

CONSTITUTION, ART. 2, SECTION 29.

May 15, 1925.

This office has invariably advised that since the ratification of the constitutional amendment voted upon in 1916 and which became effective in January, 1917, the General Assembly has not power to pass any local, private or special act or resolution which directs the laying out, opening, altering, maintaining or discontinuing of particular highways, streets or alleys. The act of the recent session of the Legislature in relation to roads to be laid out in Bakersville Township, Mitchell County, offends against this constitutional provision if any act of the Legislature could. In section 1 it not only directs the laying out and construction of a particular road, giving its termini and location, but attempts to control the manner of its construction, its width, etc. That it is accompanied with a bond issue we think is not material, because it is impossible to separate the bond issue from section 1 of the act in such way as to make the bond issue effective, while section 1 was void as unconstitutional, it being one single scheme with all those parts forming portions thereof.

SALARY AND WAGE COMMISSION—UNIVERSITY

May 21, 1925.

For the Board of Trustees of the University of North Carolina, you ask the opinion of this office as to whether H. B. 1288, S. B. 929, session of 1925, "An act to provide a salary and wage commission," applies to that institution.

It is suggested that Constitution, Article IX, Section 6, places the control and management of the University so completely within the hands of its Board of Trustees as to withdraw it from the purview of the act. That section is as follows:

The General Assembly shall have power to provide for the election of trustees of the University of North Carolina, in whom, when chosen, shall be vested all the privileges, rights, franchises and endowments thereof in any wise granted to or conferred upon the trustees of said University; and the General Assembly may make such provisions, laws and regulations from time to time as may be necessary and expedient for the maintenance and management of said University.

The plenary power of the General Assembly to control and manage the University was judicially determined and declared anterior to the adoption of the present Constitution. Its nature as an instrumentality of the State is described by Chief Justice Ruffin in *University v. Maultsby*, 43 N. C., 257:

But the Court is further of the opinion that the University is a public body politic and hence, subject to legislative control. . . . But the University was founded by the State on the public funds and for a general public charity . . . and therefore, the corporation is not only originally a creature of the Legislature, but it is absolutely dependent on its will for its continuing existence. Hence, it seems to the Court that there cannot be an instance of a corporation more exclusively founded for the public, more completely a creature of public policy, for public purposes purely, than the University of North Carolina. It is as much so as those other public functionaries, the president and directors of the literary board and the board of public works. It is true that since the incorporation there may have been donations to the college; but that would not alter the nature of the foundation, nor the character of the corporation. It is merely a political agent—an instrument of the State; and it follows that organization, devotion and government: its power of acquiring property: and the disposition of the property belonging to it—at all events, so far as it is a public endowment—are subjects for legislative regulation.

This was said in 1852. The Constitutional provision then in force was Section 41 of the Constitution of 1776:

And all useful learning shall be duly encouraged and promoted in one or more universities.

At that time the University received no State appropriation for maintenance. (N. C. Manual of 1925, page 219) It is now being supported largely from the public funds. Of its total maintenance income of \$949,000 for the year 1923-24, \$650,000 was from State appropriations. The State appropriation for maintenance for the year 1925-26 is \$750,000, and for 1926-27, \$800,000.

It was assumed by the Court in the Maultsby case that the very act of the creation of the University by the State gave the Legislature the implied power to control and manage it. The Maultsby case is quoted with approval in *University v. Railroads*, 76 N. C., 103, since the adoption of our present Constitution. Article IX, Section 6, of our present Constitution, instead of limiting the power of the Legislature, places upon it the duty to maintain the University and clothes that body with the right to manage it. The right to manage would seem necessarily to follow as a corollary of the duty

to maintain. In order that it may properly act in both instances, it must have the necessary information as to the needs and operations of the institution. It may use a salary and wage commission for this purpose as well as any other commission or committee. It follows that there is nothing in the Constitution which prevents the application of the act to the University.

Is the University included within the provisions of the Act? By Section 2 it is to apply to "the executive and administrative departments and other agencies of this State." In subsequent sections the reference is to "these departments and agencies" or "said departments and agencies." It applies to the University only if the term "other agencies of this State" includes it.

Quite frequently the instrumentalities used by the State to carry on its educational, charitable and penal work are designated and referred to as "institutions." That term is sufficient to include the University, State College, the State Hospitals, Caswell Training School, and all other of such instrumentalities of the State. If the absence of the use of that word and the use of the expression "other agencies" results in the exclusion of the University from the operation of the act, it must follow that it would also exclude other State institutions therefrom.

The word "agencies" is a broad and general term, and necessarily comprehends an instrumentality which the State may adopt and use for carrying into effect any of its plans and purposes. Ordinarily and usually it has the generic sense of any instrumentality through which another may act. In providing and offering higher education to the youth of the land, the University, State College, and other educational institutions have been set up as instrumentalities or "agencies of this State" for that purpose. A construction which would withdraw the University from the operation of the act would necessarily have the same effect as to the other State institutions, and render the term used "other agencies of this State" practically meaningless.

Support for the view here presented is found in an opinion of this office rendered June 16, 1919, in regard to the eligibility of a Trustee of the University for the Presidency of that institution. The statute, C. S. 7519, prohibited such election by the "governing body of any of the various State institutions (penal, charitable or otherwise)." The statute did not specifically name "educational" institutions, but this office held that by the use of the words "or otherwise" it was intended to embrace educational institutions, thus giving significance to all the terms used.

For the reasons stated, I reach the conclusion that the act to provide a salary and wage commission applies to the University and all other institutions of the State, and that there is no constitutional prohibition against the passage of such an act by the Legislature.

MEDICAL EXAMINERS—REVOCATION OF LICENSE

June 22, 1925.

There are two methods by which you can proceed against the physicians convicted of offenses against the Harrison Narcotic Act at a recent term

of the Federal Court and sentenced to various terms of imprisonment in the Federal Prison at Atlanta. First, serve a notice on them through the mails at the Atlanta Prison under section 6612, summoning them to appear at some time and place to answer the charges; or, second, you may await the end of the imprisonment of these physicians and then proceed under section 6618 after having given them notice to appear at a certain time.

If you proceed in the first method suggested, they might, after the term of prisonment had expired, attack the findings of your board as not being based upon a proper summons in writing, giving them notice of the time and place in which the hearing should be held. A person imprisoned in the penitentiary, however, is still subject to legal process in the nature of a civil summons upon a suit brought against him, and the service of that summons by an officer, if located within the State, would be sufficient upon which to found a judgment in that case.

STATUTE—SUNDAY—DAY EMPLOYED

July 27, 1925.

I have your letter of July 23d, asking my opinion as to whether under C. S. 6655 the members of your board can charge for per diem for Sundays engaged in traveling to places where examination of applicants is to be held. I find no construction of the statute nor of any similar statutes in our reports which would throw light on the question. I can, therefore, give you my opinion based upon the words of the statute and the reasoning of the thing.

The statute says that the members of the board "shall receive the sum of \$10 for each day actually employed in the discharge of their official duties." Construing this language, it seems to me that they could not well be "actually employed in the discharge of their official duties" on Sundays. I take it that the board would not undertake to hold a meeting or conduct an examination on a Sunday. Legally, Sunday is *dies non* for all practical purposes. Only from necessity would a court continue a session into a Sunday and it is because of this that it may on occasion do so.

There is certainly much doubt as to the right of the members of the board to receive pay under the circumstances submitted in your letter. I think that the better opinion certainly is that they are not entitled to compensation for such days. I, therefore, advise that you should not pay them for the Sundays when they are engaged in traveling to attend meetings of the board.

SOLVENT CREDIT—VALUE

August 27, 1925.

In your letter of August 25th you state that a tax payer holds notes secured by a mortgage on lands sold by him and that the property securing the

obligation is not worth the debt on it. The tax payer wants to know if he must list the note for the full amount or for a less value determined by the value of the land securing it.

The value of the land mortgaged would not be absolutely determinative of the question. The debtor may be otherwise solvent and from a consideration of that fact, the note might be worth the full amount.

In determining what should be done, I call your attention to Revenue Act, 1925, Section 44:

And it shall be the duty of said township list-taker and assessor to ascertain by visitation, investigation or otherwise the actual cash value in money of each piece or class of property in his township and to list such property at its actual value for taxation.

Further, Section 47 provides:

All articles of personal property shall, as far as practicable, be valued by the list-takers and assessors according to their true value in money.

You will thus see that all property is to be listed at its true value in money. This requirement applies to solvent credits as well as to lands and horses. Although the note may be for \$10,000, yet if its present actual value is less than that sum, it should be listed at its real value rather than its face value. Its actual value should be determined as of the present time and not upon future contingencies. In other words, its actual value will be determined by what the holder of the note could at the present time realize on it, just as that is the criterion for determining actual value of other property.

If the debtor is insolvent and the mortgaged land securing the note is worth only \$4,000, that is all that the tax payer could realize on it at the present time and it is, therefore, the true value of the note and it should be listed at that figure. It is the duty of the taxing authorities through their own investigation to determine this actual value and to have the note listed in accordance with such determination.

AUTOMOBILE—STATE OWNED

Section 3 of the act causes the greatest difficulty in an effort to construe and apply it. The particular provision with respect to which this difficulty is found is the proviso "That nothing in this act shall be construed to authorize the purchase or maintenance of an automobile at the expense of the State by any State officer unless he is now authorized by statute to do so." Because of the limited meaning of the word "statute," it might be held that no automobile or truck could be purchased for the use of the State unless a specific statute in exact words so authorized. But the act must be construed as a whole.

So far, we have been unable to find any such specific authority except that with respect to an automobile for the Executive Mansion. By explicit

proviso the act in none of its sections applies to this automobile for the Mansion, and yet it contemplates and presupposes that there is existent authority for the purchase and maintenance of automobiles by other State agencies. It does so in the first section, in that it prohibits the use of such public-owned automobiles for private purposes. It does so in the third section, for there it prohibits the purchase of such automobiles, other than motor trucks, at a price in excess of \$1,500 except upon the approval of the Governor and Council of State. It does so in the fourth section, in that it provides for the labeling of all public-owned automobiles in such a way as to indicate such ownership.

These restrictions upon the use, operation, maintenance and purchase, and provisions for the designation, of such automobiles would be absurd if there are no such public-owned automobiles and if there could be none such except that for the use of the Governor. The act in specific terms is not to apply to the automobile for the Executive Mansion. If under the statute itself there could be no public-owned automobiles, it is attempting to operate upon and with respect to something that is nonexistent and could not exist.

There are other reasons why it cannot well be held that it was intended by the Legislature to prohibit the purchase or maintenance of any automobiles by the State except that for the use of the Governor. At this same session the General Assembly provided for a bond issue of \$20,000,000 to be used in road construction. It raised the gasoline tax from 3 to 4 cents and the proceeds of that tax are to be used for the same purpose. It knew as a matter of course that automobiles and motor trucks were not only proper and useful instrumentalities for the conduct of this work, but also that they were, and are, absolutely necessary. If the Highway Commission may not purchase and maintain motor vehicles in the conduct of its operations, then its agents and employees must either travel on busses, trains, or go back to the vehicles of the earlier time. To do that would not only be absurd—it would tremendously increase the expensiveness of the Highway Commission's operations. And it is hardly supposable that the Legislature would have continued the great program of road building, begun and prosecuted largely because of the development of automobile traffic, if it had intended that the Commission charged with the duty of that construction might not take advantage of the means thus provided for the most expeditious and economical supervision and direction of its work.

It is impossible to set out by statute with particularity and detail all the things that the agents and employees of the State may, or may not, do in the prosecution of the State's business. Many things must be left to the initiative and the discretion of its officers and agents. Trust and responsibility must be reposed somewhere. The State must avail itself of such means and agencies as are requisite, essential and appropriate, and conducive to the ends in view. As the individual adjusts himself to changing conditions and avails himself of the mechanical contrivances of the new age, so must the State.

It does not follow that every State department or agency may purchase and maintain motor vehicles. It is only when the work of such department or agency is of such a nature that the use of such a vehicle is appro-

prate and useful, that it may be permitted. For instance, the work of this Department is not of such a nature as to justify such a purchase and maintenance. The same may be said of most of the other State departments. In each instance the matter must be determined in good faith by the commission or board having control of the particular State business committed to its charge.

This Department has heretofore approved the usage of the Revenue Commissioner in requiring his deputies and agents to supply their own cars and allowing them a certain amount per mile for operation. It is suggested that this plan should be used by others where at all practicable. This plan, as well as any other, demands rigid supervision on the part of the responsible official in charge so that the State's business may be economically conducted. The desire we find on the part of all State departments, agencies and institutions to strictly comply with the requirements of the act indicates that this will be done.

MARRIAGE—AGE OF PARTIES

January 19, 1926.

By Chapter 75, Public Laws of 1923, now III C. S. 2494, sixteen is fixed as the age at which both males and females may marry. As to females, this general provision is broadened by the proviso that females between the ages of fourteen and sixteen may marry under a special license to be issued only after the written consent of one of the parents of such female or of that person standing *in loco parentis* to her has been filed with the register of deeds. This proviso further stipulates that the fact of the filing of such written consent shall be set out in the special license. No license for the marriage of a female between the ages of fourteen and sixteen should be issued unless and until the requirements of this statute are complied with.

There is no exception as to males, and a license for the marriage of a male under sixteen years should in no case be issued.

As to both males and females between the ages of sixteen and eighteen, the license should not be issued until the register of deeds has the consent in writing of the parent or other person with whom such minor resided, as set out in I C. S. 2500. The act of 1923 does not at all change the provisions of I C. S. 2500, and the register of deeds, therefore, has no authority to issue licenses for those between sixteen and eighteen years of age except as set out in that section. The law on the subject is generally as it was prior to the act of 1923. That act further limits and restricts the issuance of marriage licenses by raising the age for females from fourteen to sixteen years except in those cases where a special license is issued for a female between fourteen and sixteen upon the written consent of the parent or person *in loco parentis* as therein set out.

I summarize the law on the subject as follows:

- (1) Do not issue marriage license for male or female under sixteen years of age except for female as set out in (2) below.
- (2) Special license may be issued for female under provisions of Chapter 75, Public Laws of 1923.
- (3) Do not issue marriage license for male or female between the ages of sixteen and eighteen except as authorized in I C. S. 2500.

A. & N. C. R. R.—SURETY DEPOSIT

March 4, 1926.

You submit to me request for opinion of this office in regard to control of securities deposited or to be deposited by lessee of the Atlantic & North Carolina Railroad to guarantee faithful performance of the terms of the lease.

This lease provides that lessee "will deposit and keep on deposit with the Treasurer of the State of North Carolina, or in such bank or banks, or other depository that may be approved by directors of the lessor, from year to year, and all the time during the continuance of the said lease, the sum of one hundred thousand (\$100,000) dollars in United States bonds, or other marketable securities acceptable to the directors of the lessor and having a market value of not less than said sum," as security for the faithful performance of the terms of the lease. This lease containing the quoted provision is dated September 1, 1904.

It seems that on September 6, 1904, an agreement was entered into between the lessor, the lessee and the Wachovia Loan & Trust Company as trustee reciting the deposit with said trustee by the lessee of "eighty (80) North Carolina Construction Six Per Cent Coupon Bonds each of the denomination of one thousand (\$1,000) dollars." This agreement sets out the execution of the lease on 1 September, 1904, and the requirement for the deposit of certain securities for the faithful performance of the stipulations of the lease on the part of the lessee. The agreement is that the trustee shall hold the securities for the purpose indicated and fully set forth in the contract or lease, "a copy of which said lease is hereto attached and made a part of this agreement."

From the facts presented to me and upon a consideration of the lease, and especially of the provisions quoted therefrom above, and of the deposit agreement of 1 September, 1904, I am of the opinion that the board of directors of the Atlantic & North Carolina Railroad have a right to designate the place of deposit of the securities provided for within the terms of said lease, that is, "with the Treasurer of the State of North Carolina, or in such bank or banks, or other depository as may be approved by the directors of the lessor." I am further of the opinion that the directors may "from year to year" determine the place of such depository and that it will be their duty to pass upon and approve the securities so offered. I am of the opinion that it is the duty of the directors to examine and pass upon these securities and to take care and see to it that they are standard quality and have a market value of not less than \$100,000.

STATE SCHOOL FOR THE BLIND—TUITION

April 1, 1926.

You submit to me resolution of your board of directors, asking for my opinion as to whether you and they are required under Chapter 120, Public Laws of 1925, to require the pupils in your school or their parents or guardians to pay for the care and training they receive.

The act provides that all persons admitted to certain State institutions, including the School for the Blind and Deaf at Raleigh, "are hereby required to pay the actual cost of their care, treatment, training and maintenance at such institution." It directs the board of directors to ascertain such cost, to demand its payment, and that thereupon the parent or guardian "shall have the option to pay the same or to remove the patient, pupil or inmate from such institution." In further detail it sets out the method by which this charge against such patient or inmate may be collected, removes any statute of limitation as against the State and in favor of such pupil, patient or inmate, or his legal representatives.

I find that you conduct a school which, as adjusted to the needs of the pupils, is comparable with ordinary elementary and high schools of the State. You have a regular school term of nine months. The children are sent home at the end of the term. You do not undertake to give college instruction.

By the terms of III C. S. 5764 *et seq.*, blind and deaf children of sound mind in the State are required to attend a school for the blind and deaf for a term of nine months each year. Parents and guardians who fail to send their children between the ages of seven and eighteen years to such school for the term prescribed, after receiving appropriate notice, are declared to be guilty of a misdemeanor.

The State schools for the blind and deaf are educational institutions. The Constitution of North Carolina guarantees the right to the privilege of education on the part of its children. Specifically the State is required to provide schools "wherein tuition shall be free of charge to all children of the State between the ages of six and twenty-one years." The details of providing the means of education are largely left to legislative discretion, but the fundamental requirement must be met.

Blind, deaf and dumb children cannot be educated by the ordinary means and in those schools which those not thus afflicted usually attend. But their defects do not lessen their rights or relieve the State of its obligation.

The fact that the Constitution directs that the State shall be divided into a convenient number of districts does not prevent legislative provision for the education of the blind, deaf and dumb in schools other than those thus provided. The facilities supplied should be in reasonable proportion to the need and adjusted to the condition of those to whom instruction is offered.

It is obvious that these defectives cannot be properly taught in the community schools with those of fully developed faculties. The General Assembly recognized this condition and the need thus arising. It accordingly established these schools for the blind, deaf and dumb. They are conducted in accordance with the legislative intent to provide this class of children with opportunities equal to those enjoyed by the more fortunate. Compulsory attendance applies to them as well as to these others.

These defectives are entitled to the opportunity of education. The State does not give that opportunity in the local schools. For convenient and economical instruction, it is offered through these institutions. I reach the conclusion that the blind, deaf and dumb children of the State have the

right to attend the schools so established without being compelled to pay for their instruction and training therein. I am of the opinion, and so advise, that you and your board of directors should not undertake to collect for their training from the children themselves or their parents or guardians.

NATIONAL BANKS—INSOLVENCY—TAXES

July 6, 1926.

I have your letter of July 5th. You state in your letter that the First National Bank of Lumberton is wholly insolvent, its doors having been closed and it placed in liquidation under the direction of the Comptroller of the Currency on July 21, 1925. The Sheriff of Robeson County has made demand upon the receiver for corporate excess tax and also the ad valorem capital stock tax for the year 1925.

Section 5219 of the Revised Statutes of the United States has been twice amended within the past few years. The first amendment was March 4, 1923, 42 Stat., 1499, again on March 25, 1926, 44 Stat. These amendments are not material, however, to the matter presented in your letter. The section under which the tax was levied upon the shares of stock in a national bank is section 11 of the Machinery Act of 1925. The general scheme provided by that act is a determination of the value of the outstanding shares of capital stock of a banking institution in the hands of its shareholders as of the first of May of the current tax year in accordance with the machinery provided in that section. After the ascertainment of the value of the individual shares of stock in this manner, they are certified to the particular bank for taxation in the locality in which the bank is situated. The bank itself is required to pay these taxes and to charge up the same against the individual holder of the shares, the expression being as follows:

Any taxes so paid upon any such shares may, with the interest thereon, be recovered from the owners thereof by the bank, company, association or officer paying them or may be deducted from the dividends accruing on such shares.

This act is in thorough accord with the permission of Congress to the various states to levy such tax. Revised Statutes, Section 5219, as amended by the act of March, 1923, March, 1926, and brought forward in the Compiled Statutes Supplement to 1925, Section 9784.

The Supreme Court of the United States in *Bank of California v. Richardson*, 248 U. S., 476, and *Des Moines National Bank v. Fairweather*, 263 U. S., 103, has sustained the method adopted by the State of North Carolina in taxing the shares of stock in these national banking associations. The method by which these taxes are collected is, as before said, to certify them to the subordinate governmental agency in accordance with the value determined by the Commissioner of Revenue during the month of May for the ad valorem tax levied by these agencies and for the purpose of taxation, the shares of stock are to be taken as located at the point at which the bank is located. After the ascertainment of the value of the shares of stock

in a particular case in accordance with the provisions of section 11 of the Machinery Act of 1925, but before the levy of any tax, the shares of stock are unquestionably without any value at all.

(1) It is clear from this recapitulation and the decisions of the United States Supreme Court cited in the connection, that there can be in no way any corporation excess tax to be collected by the State or any of its governmental agencies, regardless of whether or not the bank is insolvent.

(2) The decisions in the subordinate Federal courts tend to show that this share tax cannot be collected from a receiver of an insolvent national bank on the ground that the shares are generally worse than worthless and that the receiver has no assets belonging to the shareholders which can be applied to the payment of taxes assessed on such shares. *Stapylton v. Thaggard*, 91 Fed. Rep., p. 93.

The Supreme Court of the United States has not passed directly upon this point. It is alluded to incidentally at p. 446 in 166 U. S., in *First National Bank v. Chehalis County*, in the following terms:

It was not alleged in the bill of claim or argument that the bank is not in possession of funds belonging to the stockholders severally sufficient to pay the tax proportioned to their ownership of the stock.

We assume from your letter that the First National Bank of Lumberton is wholly insolvent in such way as to require the receiver to enforce the double liability of the statute against the individual stockholders. If the receiver was required to pay these taxes, then, he would have to pay them from the assets of the defunct bank and consequently, it would be in the first instance a tax upon the property of the bank itself, and it is clear from the decisions of the United States Supreme Court that this is not allowable except upon the real estate of the bank held in the locality in which it is taxed. That under the North Carolina statute the receiver would have authority to collect taxes from the individual stockholders we think does not avoid this consequence, for it may be that some of the individual stockholders themselves might be insolvent and so the tax could not be collected from them.

UNITED STATES—MADE LANDS

July 10, 1926.

In your letter of July 9th you propound certain questions to this office arising out of the construction of Chapter 197, Public Laws of 1913. That Chapter is brought forward in the Consolidated Statutes of 1919 as Section 7583. Stated broadly, the effect of that act is to withdraw lands made by material excavated in the construction of the inland water-way by the United States Government, when the lands so made are within a distance of one thousand feet on either side of said inland water-way, from entry by and grant to a private individual. It further directs the Secretary of State to issue a grant to the United States Government for these made lands upon certificate furnished to him by some authorized official of the United States.

The effect of this, as above said, in the opinion of this office is to remove these lands from the right of entry by a private individual. This office has so held in one or two instances when an attempt has been made by a private individual to enter such lands.

(1) The first question is, whether or not the terms used in the act, "lands theretofore submerged," include lands submerged at high tide but not at low tide. We think the supreme Court of North Carolina in *Ward v. Willis*, 51 N. C., p. 183, has answered this question. That decision is to the following effect:

Land lying between the high and low water lines of the tides of the ocean or of a navigable stream is not subject to private appropriation under the acts authorizing the entry and grant of lands by the State.

(2) If private persons have heretofore entered these lands made by the United States depositing material, is the United States debarred from now claiming title? As hereinbefore stated, this office when an entry was made of such lands has heretofore advised the Secretary of State that the entry was void and that he could not issue a grant upon such entry. Indeed, if the grant had been issued upon such entry, the grant itself would be void in the face of the act of 1913. Just here it would be well to note an exception which arose out of a peculiar condition. At common law the sovereign had authority to grant lands covered by navigable water. In North Carolina this authority was expressly abrogated by statute except for a short period running from 1836 to 1846. If, therefore, the State granted land covered by navigable water in this period, and the grant covers the submerged land upon which the material was deposited by the United States Government, the land thus made would accrue to the benefit of the person holding a valid grant to the submerged land upon which it was deposited. See *Hatfield v. Grimsted*, 29 N. C., 139.

(3) If the United States Government deposited excavated material on submerged lands adjoining marshes, islands or other property to which private parties have a clear title, does such made land come within the provisions of the act of 1913? We think very clearly it does. This would be in no sense an accretion to the lands of private persons holding title as above stated. The deposit was made upon land to which they could acquire no title under the ordinary rule.

It is well to call attention here to Section 7543 of the Consolidated Statutes which permits an entry of lands by riparian owners in a modified way with a view of the erection of wharves as provided in that section. We think, however, you will have no trouble on this score as the deposit would scarcely have been made where an entry for wharves had already been made.

JUVENILE COURT—JURISDICTION

July 21, 1926.

I have your letter of July 20th in which you state that a boy under fourteen years of age is charged with a violation of C. S. 4209, the offense being

committed against a girl thirteen years of age. You ask my opinion as to whether you should hear this case as juvenile judge or send it to the superior court.

The law regulating juvenile courts may be found in II C. S. 5039 *et seq.* The statute was given very elaborate consideration in an opinion by Justice Hoke in *State v. Burnett*, 179 N. C., 735. Construing the whole of the act, and especially what is now II C. S. 5047, it was there held:

1. That children under fourteen years of age are no longer indictable as criminals but are, in the cases specified, committed for reformation and primarily to the juvenile department of the superior court.

2. That in case of felonies which cannot exceed imprisonment for ten years, the accused children fourteen years and over, to sixteen, are committed to the investigation of the juvenile court, but in the discretion of the judge of the juvenile court may be bound over to the superior court.

3. And in cases of felonies where the punishment may be more than ten years, children of fourteen years and over so charged are subject to the jurisdiction of the superior court just as adults for the same offenses.

This is the general law on the subject. But the law with respect to the offense about which you write was changed by Chapter 140, Public Laws of 1923 (now III C. S. 4209 and 4209-a). This statute was passed since the opinion in *State v. Burnett*, *supra*. By this statute it is provided that a youth convicted under its provisions and who is under eighteen years of age shall be guilty of a misdemeanor only. In view of this statute I, therefore, advise you that the offense with which the fourteen year old boy is charged is a misdemeanor and not a felony. As a consequence, you as juvenile judge have jurisdiction in the case.

AGRICULTURAL EXTENSION FARM

August 5, 1926.

In the Matter of the Chicken Farm

We have carefully investigated the title to this farm and other matters relating thereto.

1. The history of the State's relation to this tract of land is as follows:

The Board of Agriculture in 1886, desiring an agricultural experimental farm situated near Raleigh, purchased a tract of ten acres just west of the city of Raleigh and of the fair grounds of the North Carolina Agricultural Society, from Sallie E. Brown and others and directed the deed to be executed to the State of North Carolina. This tract of land was described as follows:

Beginning at a stake on the Chapel Hill (Hillsboro) road in a direct line with the Fair Grounds, allowing 100 feet each way from the enclosure of the said Grounds, running thence North $2\frac{1}{4}$ degrees East 82 $\frac{1}{4}$ poles to a stake; thence North 87 degrees West 20 poles and 2 lengths to a stake; thence South $2\frac{1}{4}$ degrees West 77 poles to the Chapel Hill (Hillsboro) road; thence South $73\frac{1}{4}$ degrees East 20 poles and 21 lengths to the beginning, containing 10 acres, more or less.

The deed was properly acknowledged and probated and registered in Book 90, pages 24 and 25 of the Registry of Wake County.

It is manifest from this that the title to this ten acre tract of land was vested absolutely in the State of North Carolina.

By Chapter 308, Laws of 1885, the General Assembly attempted to establish and maintain an industrial school. By Chapter 410, Laws of 1887, the ideas of the General Assembly having been in the meantime materially expanded, the North Carolina College of Agriculture and Mechanic Arts was established. By section 6 of this Act, the Board of Agriculture was directed to turn over to the Trustees of the College the Agricultural Experimental Station located by it on said ten acres of land and the Board of Trustees were empowered to receive said land.

In consequence of Section 6 of the Act of 1887, on July 11th, 1889, a joint meeting was held between the Board of Agriculture and the Board of Trustees of the Agricultural and Mechanical College at which the question of transfer of the Agricultural Experiment Station located on ten acres of land was considered. Again on December 5th, 1889, another joint meeting was held in which certain resolutions were passed in which the Board of Agriculture turned over to the Agricultural and Mechanical College certain of the duties and property incident thereto formerly imposed upon them. The fifth resolution turned over to the College the ten acres of land now under consideration, and this resolution was as follows:

5th. *Division of Agricultural Experiment Farm.* The property now occupied by the farm of the Station consisting of ten acres of land West of the fair grounds of the State Agricultural Society and all of the buildings on the said ten acres—: plant houses, residences, dairy house, two barns, shed, and other buildings, livestock, vehicles, implements, instruments, apparatus, growing crops and other property and privileges now in use and in possession of this division and the property of the Experiment Station.

The Board of Trustees of the Agricultural and Mechanical College formally received the above property as they were empowered to do under Section 6, Chapter 410, Laws of 1887. Soon after this formal transfer and reception of the ten acres, the Agricultural and Mechanical College went into possession of the ten acres and has been in actual possession of the same since, that is, for a period of over 36 years.

2. The legal effect of this situation we think is as follows:

The legal title and the original ownership of this property was in the State of North Carolina. It was at one time in the possession of the Board of Agriculture for the purposes connected with the proper performance of its duty. When the Agricultural and Mechanical College was established, the particular duty theretofore imposed upon the Board of Agriculture was by the Act of 1887 imposed upon that College and the General Assembly directed, therefore, the possession of this tract of land to be transferred to the College for the purposes for which it was to be used. In the transaction, then, the interest of the State of North Carolina was in no particular affected. The possession of the tract for the purpose for which it was held was simply transferred from one department of the State Government to another de-

partment of that government. Using a commonplace illustration, the State in this but transferred its own property from its righthand pocket to its lefthand pocket. There is therefore no necessity for a formal deed from the Board of Agriculture to the successor of the Agricultural and Mechanical College, the North Carolina State College of Agriculture and Engineering. The physical fact of the transfer of the possession of the tract of land was amply sufficient in the light of the authority contained in Section 6 of the Act of 1887. As a corollary to this we think the State College, as it is now commonly called, has no authority, without a special Act of the Legislature, to convey title to the ten acres to a purchaser of the same when the land itself is to be devoted to private uses. If the title had been vested in the State College originally, or had since been vested in it by an act of the Legislature, no doubt it could sell and convey it under C. S. 5806. If the proposed purchaser is willing to take such title as the State College may now convey under said section, the conveyance can be made, leaving the Legislature to ratify and confirm the same.

DIRECTOR OF THE BUDGET—POWERS OF

(1) What control has the Director of the Budget over appropriations made by the General Assembly to particular institutions or departments (a) as to time of payment; (b) as to amount of payment?

The modern budget in its application to the finances of the State involves three elements. One, an investigation and report upon the amount of money which has been required to run the various institutions and departments of the State economically administered during the past fiscal period. Two, the amount necessary as estimated during the coming fiscal period. This, stated shortly, was the budget system in North Carolina prior to 1925. Three, the General Assembly of that year, however, added a new element: control by an executive body of the expenditures by the various departments and institutions of the amounts appropriated to each of them by the General Assembly. Broadly stated, the machinery by which the act (Chapter 89, Public Laws of 1925) is enforced as an advisory Budget Commission which functions more directly upon a preparation of the budget, the budget revenue act and the budget appropriation bill for the succeeding biennium, and a Director of the Budget, who is the Governor *ex officio* and who is in reality a director of the fiscal policy of the State for the present, as well as the ensuing biennium.

This discussion is confined, as above stated, to the duties, powers and authority of the Director over the amount of appropriation for a particular institution or department and its distribution and expenditure. All acts relating to the fiscal policy of the State are to be taken in *pari materia*, the later acts controlling where there is a direct repeal or such repeal by necessary implication. Particularly must this rule be applied to the acts enacted at the same session of the Legislature. The General Assembly of 1925 was confronted with a condition which was becoming so acute that a remedy must be provided at once. The State was evidently drifting into financial chaos, spending year by year more than its income. The Legislature, then,

adopted three remedies: It cut appropriations to the various institutions and departments below the sums asked by such departments and institutions; it increased taxes materially, and then in section 8 of the appropriation act (Chapter 275, Public Laws, 1925) authorized the Director of the Budget to scale appropriations to the extent necessary to make them accord with the funds collected for the payment thereof:

The purpose and policy of this provision is to provide and insure that there shall be no overdraft or deficit growing out of appropriations for maintenance as herein provided, and the Director of the Budget is requested and directed so to administer this act as to prevent the same.

He is given authority once each month to determine how much of the appropriation should be allocated to a particular institution or department the succeeding month. Thus, he has clear authority to reduce the appropriation in all instances to an amount which can be met by subsequent or existing tax collections. This power is very broad and extensive. Section 18 of the executive budget act (Chapter 89, *supra*) reinforces the power thus given to the Director of the Budget in the appropriation bill by requiring each institution or department to submit to him twenty days before the beginning of each quarter a requisition for an allotment of the amount estimated would be required to carry on the work of such governmental agency during the ensuing quarter and such requisition is to contain all the details of the proposed expenditure that the Director may require. He may approve such allotment or modify such allotment, and it is only upon such approval and allotment that the State Auditor is authorized to issue his warrant for the payment of the appropriation. These provisions impose upon the Director very broad and extensive powers. We think two corollaries can be deduced from this delegation of power. First, if it develops that an appropriation to a particular institution or department is more than sufficient for its maintenance when economically administered, as evidenced by positive results, then such excess may be carried forward from quarter to quarter to the end of the biennium, when it would fall into the general fund, and meantime, it may be used by the general fund in meeting other liabilities of it, subject, however, to be returned to the institution or department during the biennium if its necessary requirements should make it just that it should be (Section 19, Chapter 89 above). Second, the Director of the Budget has general oversight over all the expenditures of the State's money in the support and maintenance of all the institutions and departments with the exception of the Highway Department (See Section 28, Chapter 89). In short, the State has been made with reference to its expenditures of money, a huge business enterprise with the Director of the Budget as business manager.

In compliance with authority contained in section 8 of the appropriation bill, the Director of the Budget has scaled appropriations for the year 1925-26 five per cent. It it should develop that at the end of the fiscal year, June 30, 1926, that sufficient collections have been made during that period to justify the elimination of the five per cent reduction, is the Director of the Budget required under the statute to increase again the appropriations for that year

to the amount which they have been reduced, or may he postpone this increase to the end of the fiscal biennium?

While it is true the General Assembly has forbidden any particular department or institution to expend more money than half of the appropriation to it for the biennium, and while it is true that these appropriations are made with the amount fixed for each of the years, 1925-26 and 1926-27, we think that the executive budget act deals with appropriations and expenditures of money from the standpoint of the completed biennium and not from the standpoint of the end of the particular fiscal year. Previous to this act all annual appropriations unexpended at the end of the fiscal year, June 30th, and with no outstanding valid contracts against such appropriation, reverted to the general fund of the State Treasury. In other words, to that extent it ceased to be an appropriation from the State Treasury. The executive budget act, however, in section 19 postponed this reversion to the end of the biennium, so the act contemplated the appropriations certainly so far as the physical management of those appropriations was concerned, as ending at the biennium, June 30, 1927, and not at the end of the fiscal year, June 30, 1926. We think, therefore, that the Director of the Budget is not required to reinstate the five per cent reduction in the appropriations until he has ascertained the relation of the collection of taxes for the biennium to the expenditures of the money appropriated by the General Assembly.

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